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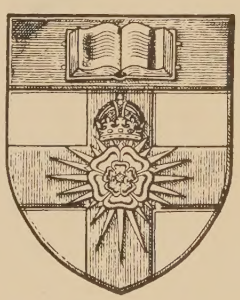

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CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

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Page	*Line*	*For*	*Read*
85	11	*E. S. Ford*	*Edward Ford.*
286	22	after "is" insert "not."	
298	17	delete "by will."	
317	21	Plaintiffs	Defendants.

The Mode of Citation of the Volumes in the LAW REPORTS, commencing January 1, 1891, will be as follows:—

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[1891] 1 Ch. [1891] 2 Ch. [1891] 3 Ch.

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[1891] 1 Q. B. [1891] 2 Q. B. [1891] P.

In the Third Series,
[1891] A. C.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Agricultural Hotel Company, *In re* – – – – –	396
Alabama, New Orleans, Texas and Pacific Junction Railway Company, *In re* – (C.A.)	213
Apollinaris Company's Trade Marks, *In re* – (C.A.)	1
Arbib and Class's Contract, *In re* (C.A.)	601
Arnold, Burt *v.* *In re* Jeffery –	671
Ashling *v.* Boon – – –	568
Attorney-General *v.* Edwards –	194
——— ——— *v.* Morgan (C.A.)	432
Australasian Investment Company, *Ex parte*. *Ex parte* Union Bank of Australia. *In re* Queensland Mercantile and Agency Company – –	536
Aylesford (Earl of) *v.* Poulett (Earl) – – (C.A.)	248

B.

	PAGE
Barnett *v.* King – (C.A.)	4
Barney *v.* Joshua Stubbs, Limited. *In re* Joshua Stubbs, Limited	187
——— ——— – (C.A.)	475
Bellamy *v.* Debenham (C.A.)	412
Bennett, Cox *v.* – (C.A.)	617
Bills *v.* Tatham. *In re* Patrick (C.A.)	82
Bilston Commissioners, Wolverhampton (Corporation of) *v.*	315
Blyth *v.* Fladgate – – –	337
——, Morgan *v.* – – –	337
——, Smith *v.* – – –	337
Boon, Ashling *v.* – – –	568
Boyton, Elve *v.* – (C.A.)	501
Bridgewater Navigation Company, *In re* – – – –	155
Britannia Fire Association, *In re*. Coventry's Case – (C.A.)	202
Bultfontein Mining Company, Frames *v.* – – – –	140

PAGE

Burt *v.* Arnold. *In re* Jeffery – 671
Bushby, Jenkins *v.* (C.A.) 484

C.

Campbell *v.* Lloyd's, Barnett's and Bosanquet's Bank – 136, n.
Class and Arbib's Contract, *In re* (C.A.) 601
Cooke *v.* Smith – (C.A.) 509
Coventry's Case. *In re* Britannia Fire Association (C.A.) 202
Cox *v.* Bennett – (C.A.) 617
Croom, *In re.* England *v.* Provincial Assets Company – 695

D.

Davie and Drummond's Contract, *In re* – – – – 524
Debenham, Bellamy *v.* (C.A.) 412
Dick, *In re.* Lopes *v.* Hume-Dick – – – (C.A.) 423
Dodsworth, *In re.* Spence *v.* Dodsworth – – – – 657
———, Spence *v.* *In re* Dodsworth – – – – 657
Drummond and Davie's Contract, *In re* – – – – 524
Dunham, Mills *v.* – (C.A.) 576

E.

Eames, Perry *v.* Salaman *v.* Eames. Mercers' Company *v.* Eames – – – – 658
Edmondson and Sandbach's Contract, *In re* – – (C.A.) 99
Edwards, Attorney-General *v.* – 194
———, Lawrence *v.* – – 144
Elve *v.* Boyton – (C.A.) 501
England *v.* Provincial Assets Company. *In re* Croom – 695

F.

Fillingham *v.* Wood – – 51
Firth, Liverpool and Manchester Aërated Bread and Café Company *v.* – – – – 367

PAGE

Fladgate, Blyth *v.* – – – 337
Frames *v.* Bultfontein Mining Company – – – – 140
Frere, Williams *v.* *In re* Smith 323

G.

General Service Co-operative Stores, *In re* – (C.A.) 496
Gledhill, Halifax Joint Stock Banking Company *v.* – – 31
Governments Stock Investment Company, *In re* – – – 649
Graham's Trusts, *In re* – – 151

H.

Halifax Joint Stock Banking Company *v.* Gledhill – – 31
Hanbury, Scott *v.* *In re* Scott – 298
Harding's Estate, *In re* – – 60
Hepburn, Slevin *v.* *In re* Slevin 373
Heseltine, *In re.* Woodward *v.* Heseltine – – (C.A.) 464
———, Woodward *v.* *In re* Heseltine – – (C.A.) 464
Hine, Williamson *v.* – – 390
Holborrow, Pitman *v.* *In re* Mabbett – – – – 707
Hume-Dick, Lopes *v.* *In re* Dick (C.A.) 423

J.

Jackson, Jenkins *v.* (C.A.) 89
James *v.* Smith – – – 384
Jeffery, *In re.* Burt *v.* Arnold – 671
Jenkins *v.* Bushby – (C.A.) 484
——— *v.* Jackson – (C.A.) 89
Johannesburg Hotel Company, *In re.* *Ex parte* Zoutpansberg Prospecting Company (C.A.) 119
Joshua Stubbs, Limited, *In re.* Barney *v.* Joshua Stubbs, Limited – – – – 187
———————————————
(C.A.) 475
———————————————, Barney *v.* *In re* Joshua Stubbs, Limited 187
———————————————
(C.A.) 475

K.

PAGE

King, Barnett *v.* – (C.A.) 4
King's College, Cambridge, *Ex parte* – – – – 333, 677
Knight, Moore *v.* – – – 547
Knowles *v.* Scott – – – 717

L.

Lashmar, *In re.* Moody *v.* Penfold – – – (C.A.) 258
Lawrence *v.* Edwards – – 144
Little *v.* London Joint Stock Bank – – (C.A.) 270
Liverpool and Manchester Aërated Bread and Café Company *v.* Firth – – – 367
Lloyd's, Barnett's and Bosanquet's Bank, Campbell *v.* 136, n.
London Joint Stock Bank, Little *v.* – – – (C.A.) 270
———————, Simmons *v.* – – (C.A.) 270
Lopes *v.* Hume-Dick. *In re* Dick – – – (C.A.) 423

M.

Mabbett, *In re.* Pitman *v.* Holborrow – – – – 707
Macgowan, *In re.* Macgowan *v.* Murray – – (C.A.) 105
——— *v.* Murray. *In re* Macgowan – – (C.A.) 105
Makins *v.* Percy Ibotson & Sons 133
Meeus' Application, *In re* – 41
Mercers' Company *v.* Eames – 658
Mills *v.* Dunham – (C.A.) 576
Moody *v.* Penfold. *In re* Lashmar – – – (C.A.) 258
Moore *v.* Knight – – – 547
Morgan, Attorney-General *v.* (C.A.) 432
——— *v.* Blyth – – – 337
Mundy's Settled Estates, *In re* (C.A.) 399
Murray, Macgowan *v.* *In re* Macgowan – – (C.A.) 105

P.

Park, Wignall *v.* *In re* Parker 682
Parker, *In re.* Wignall *v.* Park 682
Patrick, *In re.* Bills *v.* Tatham (C.A.) 82
Penfold, Moody *v.* *In re* Lashmar – – – (C.A.) 258
Percy Ibotson & Sons, Makins *v.* 133
Perry *v.* Eames – – – 658
Pitman *v.* Holborrow. *In re* Mabbett – – – – 707
Poulett (Earl), Aylesford (Earl of) *v.* – – – (C.A.) 248
Provincial Assets Company, England *v.* *In re* Croom – 695
Pyle Works (No. 2), *In re* – 173

Q.

Queensland Mercantile and Agency Company, *In re.* *Ex parte* Australasian Investment Company. *Ex parte* Union Bank of Australia – – 536

R.

Roberts and Whiteley's Arbitration, *In re* – – – – 558
Russell, Taylor *v.* – (C.A.) 8

S.

Salaman *v.* Eames – – – 658
Sandbach and Edmondson's Contract, *In re* – (C.A.) 99
Scott, *In re.* Scott *v.* Hanbury 298
—— *v.* Hanbury. *In re* Scott – 298
——, Knowles *v.* – – – 717
Simmons *v.* London Joint Stock Bank – – (C.A.) 270
Slevin, *In re.* Slevin *v.* Hepburn – – – – – 373
——— *v.* Hepburn. *In re* Slevin 373
Smith, *In re.* Williams *v.* Frere 323
——— *v.* Blyth – – – 337
———, Cooke *v.* – (C.A.) 509
———, James *v.* – – – 384
Spence *v.* Dodsworth. *In re* Dodsworth – – – – 657
Standard Manufacturing Company, *In re* – – (C.A.) 627

T.

PAGE

Tatham, Bills *v.* *In re* Patrick (C.A.) 82
Taylor *v.* Russell – (C.A.) 8
Taylor, Stileman and Underwood, *In re* – – (C.A.) 590

U.

Union Bank of Australia, *Ex parte.* *Ex parte* Australasian Investment Company. *In re* Queensland Mercantile and Agency Company – – 536

W.

Wanzer, Limited, *In re* – – 305
Weymouth and Channel Islands Steam Packet Company, *In re* (C.A.) 66
Whiteley and Roberts' Arbitration, *In re* – – – – 558
Wignall *v.* Park. *In re* Parker 682
Williams *v.* Frere. *In re* Smith 323
Williamson *v.* Hine – – 390
Wolverhampton (Corporation of) *v.* Bilston Commissioners– 315
Wood, Fillingham *v.* – – 51
Woodward *v.* Heseltine. *In re* Heseltine – – (C.A.) 464

Z.

Zoutpansberg Prospecting Company, *Ex parte.* *In re* Johannesburg Hotel Company (C.A.) 119

TABLE OF CASES CITED.

A.

		PAGE
Abbott *v.* Middleton	7 H. L. C. 68	500
Adamson, Ex parte	8 Ch. D. 807	343
Albert Life Assurance Company, In re	Law Rep. 6 Ch. 381	232
Alexander *v.* Milton	2 C. & J. 424	468
Allen *v.* Knight	5 Hare, 272	13, 23
Allsopp *v.* Wheatcroft	Law Rep. 15 Eq. 59	583
Almada and Tirito Company, In re	38 Ch. D. 415	72
Alsbury, In re	45 Ch. D. 237	163
American Pastoral Company, In re	W. N. (1890) p. 62	396
Andress's Case	8 Ch. D. 126	124
Anglo-Danubian Steam Navigation and Colliery Company, In re	Law Rep. 20 Eq. 339	184
Anglo-Moravian Hungarian Junction Railway Company, In re	1 Ch. D. 130	720
Angus *v.* McLachlan	23 Ch. D. 330	594
Arbenz' Application, In re	35 Ch. D. 248	44
Arden *v.* Arden	29 Ch. D. 702	542
Arnot's Case	36 Ch. D. 702	125
Artistic Colour Printing Company, In re	14 Ch. D. 502	496
Ashton *v.* Langdale (Lord)	4 De G. & Sm. 402	688
Asphaltic Wood Pavement Company, Re	49 L. T. (N.S.) 159	643
Athole Hydropathic Company *v.* Scottish Provincial Assurance Company	13 Court Sess. Cas. 4th Series, 818	311
Attenborough *v.* Thompson	2 H. & N. 559	466
Attenborough's Case	28 Ch. D. 682	637
Attorney-General *v.* Fraunces	W. N. (1866) p. 280	377
——— *v.* Vyner	38 W. R. 194	486
Attree *v.* Hawe	9 Ch. D. 337	686
Aulton *v.* Atkins	18 C. B. 249	88
Australian Wine Importers, In re	41 Ch. D. 278	44

B.

Badeley *v.* Consolidated Bank	34 Ch. D. 536; 38 Ch. D. 238	541
Bahia and San Francisco Railway Company, In re	Law Rep. 3 Q. B. 584	284
Bahin *v.* Hughes	31 Ch. D. 390	345
Baines *v.* Geary	35 Ch. D. 154	578
Baker *v.* Hedgecock	39 Ch. D. 520	578
——— *v.* White	Law Rep. 20 Eq. 166	266
Balch *v.* Symes	T. & R. 87	594
Bangor and Portmadoc Slate and Slab Company	Law Rep. 20 Eq. 59	74
Bankes *v.* Small	36 Ch. D. 716	528

		PAGE
Bannatyne *v.* Direct Spanish Telegraph Company	34 Ch. D. 287	230
Barker's Estate, In re	44 L. J. (Ch.) 487	34
Barlow *v.* St. Mary Abbotts, Kensington (Vestry of)	11 App. Cas. 257	198
Barnes *v.* Addy	Law Rep. 9 Ch. 244	343
——— *v.* Rowley	3 Ves. 305	714
Barrett's Case	4 D. J. & S. 416	207
Barrow *v.* Wadkin	24 Beav. 1	662
Barrow Hæmatite Steel Company, In re	39 Ch. D. 582	230, 396
Bartlett *v.* Northumberland Avenue Hotel Company	53 L. T. (N.S.) 611	190, 477
——— *v.* Pickersgill	4 East, 577, n.; 1 Eden, 515; 1 Cox, 15; Burr. 2255	384
Bate *v.* Scales	12 Ves. 402	554
Bates *v.* Johnson	Joh. 304	22
Bayley *v.* Bishop	9 Ves. 6	711
Baynard *v.* Woolley	20 Beav. 583	348
Bean *v.* Wade	1 Times L. R. 404; 2 Times L. R. 157	345
Beckett *v.* Ramsdale. In re Hodgson	31 Ch. D. 177	343, 557
Belchier *v.* Butler	1 Eden, 523	12
Bentley, Ex parte	12 Ch. D. 850	126
Bickerton *v.* Walker	31 Ch. D. 151	21
Birch *v.* Cropper	14 App. Cas. 525	73, 164
Bird *v.* Davey	[1891] 1 Q. B. 29	470
Bird's Case	4 D. J. & S. 200	207
Biscoe *v.* Jackson	35 Ch. D. 460	381
Bishop *v.* Shillito	2 B. & Al. 329, n.	287
Bizzey *v.* Flight	3 Ch. D. 269; 24 W. R. 957	85
Black & Co.'s Case	Law Rep. 8 Ch. 254	717
Blackwell *v.* England	8 E. & B. 541	468
Blackwood *v.* Borrowes	4 D. & War. 441	344
——— *v.* London Chartered Bank of Australia	Law Rep. 5 P. C. 92	12
Blain, Ex parte	12 Ch. D. 522	471
Blair *v.* Bromley	5 Hare, 542; 2 Ph. 354	342, 547
Blankenstein *v.* Robertson	24 Q. B. D. 543	466
Blundell, In re	40 Ch. D. 370	344
Blunden *v.* Desart	2 D. & War. 405	594
Bolton Partners *v.* Lambert	41 Ch. D. 295	416
Bongiovanni *v.* Société Générale	54 L. T. (N.S.) 320	276
Bouch *v.* Sproule	12 App. Cas. 385	163
Boyle *v.* Bettws Llantwit Colliery Company	2 Ch. D. 726	137
Brandon *v.* Aston	2 Y. & C. Ch. 24	673
Breull, Ex parte	16 Ch. D. 484	468
Brewer *v.* Broadwood	22 Ch. D. 105	417
Brocklehurst *v.* Railway Printing and Publishing Company	W. N. (1884), p. 70	643
Brown, Bayley & Dixon, In re	18 Ch. D. 649	307
Buccleuch (Duke of) *v.* Metropolitan Board of Works	Law Rep. 5 H. L. 418	561
Burgess *v.* Wheate	1 Eden, 177; 1 W. Bl. 123	262
Burkinshaw *v.* Nicolls	3 App. Cas. 1004	72
Burland *v.* Broxburn Oil Company	42 Ch. D. 274	45
Burrowes *v.* Lock	10 Ves. 470	345
Butler & Baker's Case	3 Rep. 26, b.	613
——— *v.* Butler	7 Ch. D. 116	348

C.

		PAGE
Cambefort *v.* Chapman	19 Q. B. D. 229	343
Campbell *v.* Compagnie Générale de Bellegarde	2 Ch. D. 181	189, 477
——— *v.* Lloyd's, Barnett's & Bosanquet's Bank	[1891] 1 Ch. 136, n.	136
——— *v.* Poulett (Lord)	W. N. (1884) p. 48	369
Cann *v.* Willson	39 Ch. D. 39	345
Case of Mines	Plowd. 310	437
Caudwell *v.* Hanson	Law Rep. 7 Q. B. 55	53
Cave *v.* Mackenzie	46 L. J. (Ch.) 564	385
Cefn Cilcen Mining Company, In re	Law Rep. 7 Eq. 88	184
Central News Company *v.* Eastern News Telegraph Company	53 L. J. (Q. B.) 236	329
Chamberlain *v.* Hutchinson	22 Beav. 444	304
——— *v.* Lee	10 Sim. 444	417
Chandler *v.* Howell	4 Ch. D. 151	686
Chase *v.* Westmore	5 M. & S. 180	594
Chaytor's Settled Estate Act, In re	25 Ch. D. 651	405
Cheetham *v.* Ward	1 Bos. & P. 630	343
Churchil *v.* Grove	1 Ch. Cas. 35	22
Clark, Ex parte	13 Q. B. D. 426	695
——— *v.* Taylor	1 Drew. 642	373
Clergy Orphan Corporation, In re	Law Rep. 18 Eq. 280	425
Climpson *v.* Coles	23 Q. B. D. 465	639
Close, Ex parte	14 Q. B. D. 386	637
Cockburn *v.* Edwards	16 Ch. D. 393	283
Coles *v.* Civil Service Supply Association	32 W. R. 407; 53 L. J. (Ch.) 638	488
Collen *v.* Wright	7 E. & B. 301; 8 E. & B. 647	209
Collinge *v.* Heywood	9 Ad. & E. 633	362
Colonial Bank *v.* Cady	15 App. Cas. 267	289, 540
Colonial Trusts Corporation, In re	15 Ch. D. 465	641
Colyer *v.* Finch	5 H. L. C. 905	12
Conning, Ex parte	Law Rep. 16 Eq. 414	638
Cooke, Ex parte	4 Ch. D. 123	276
——— *v.* Eshelby	12 App. Cas. 271	276
Cooper *v.* Macdonald	7 Ch. D. 288	528
Cooper's Trusts, In re	W. N. (1873), p. 87	425
Coote *v.* Ingram	35 Ch. D. 117	487
Cope *v* Evans	Law Rep. 18 Eq. 138	43
Cory *v.* Eyre	1 D. J. & S. 149	13
Costa Rica (Republic of) *v.* Erlanger	3 Ch. D. 62	512
Cowell *v.* Simpson	16 Ves. 275	594
Cowen *v.* Phillips	33 Beav. 18	51
Cox *v.* Hakes	15 App. Cas. 506	570, 646
Cox's Case	4 D. J. & S. 53	202
Craig *v.* Watson	8 Beav. 427	345
Creaton *v.* Creaton	3 Sm. & Giff. 386	262
Crouch *v.* Credit Foncier of England	Law Rep. 8 Q. B. 374	289
Cruse *v.* Nowell	2 Jur. (N.S.) 536	102
Cunliffe *v.* Brancker	3 Ch. D. 393	263
Cunliffe, Brooks & Co. *v.* Blackburn and District Benefit Building Society	9 App. Cas. 857	184
Cuno, In re	43 Ch. D. 12	527

		PAGE
Hatton *v.* May	3 Ch. D. 148	710
Hawley *v.* Steele	6 Ch. D. 521	662
Hayne *v.* Burchell	35 Sol. J. 88	583
Haynes *v.* Foster	2 C. & M. 237	289
Hayter *v.* Trego	5 Russ. 113	373
Hayward's Trade Marks, In re	54 L. J. (Ch.) 1003	45
Haywood *v.* Mallalieu	25 Ch. D. 357	102
Head's Trustees and Macdonald, In re	45 Ch. D. 310	417
Heard *v.* Pilley	Law Rep. 4 Ch. 548	384
Heaton's Trade Mark, In re	27 Ch. D. 576	43
Heighington *v.* Grant	1 Beav. 228	96
Henry Pound, Son, & Hutchins, In re	42 Ch. D. 402	189, 232, 476, 634
Hewer *v.* Cox	3 E. & E. 428	468
Hewitt *v.* Loosemore	9 Hare, 449	11
Hickley *v.* Greenwood	63 L. T. (N.S.) 288	468
Hill *v.* Hart-Davis	26 Ch. D. 470	522
Hills *v.* McRae	9 Hare, 297	367, 557
Hitchcock *v.* Coker	6 A. & E. 438	579
Hoare *v.* Rennie	5 H. & N. 19	417
Hodgson, In re. Beckett *v.* Ramsdale	31 Ch. D. 177	343, 552
Hoggart *v.* Scott	1 Russ. & My. 293	417
Holdsworth *v.* Davenport	3 Ch. D. 185	687
Holroyd *v.* Marshall	10 H. L. C. 191	638
Holt *v.* Mill	2 Vern. 279; 1 Eq. Cas. Ab. 229	22
Horner *v.* Graves	7 Bing. 735	584
Horwood, Re	55 L. T. (N.S.) 373	658
Howard *v.* Patent Ivory Manufacturing Company	38 Ch. D. 156	180
Howell *v.* Young	5 B. & C. 259	348
Hubbard, Ex parte	17 Q. B. D. 690	637
Hudson's Trade Marks, In re	32 Ch. D. 311	45
Hughes-Hallett *v.* Indian Mammoth Gold Mines Company	22 Ch. D. 561	346
Humphries *v.* Taylor Drug Company	59 L. T. (N.S.) 820	45
Hunt *v.* Elmes	2 D. F. & J. 578	11
—— *v.* Harris	19 C. B. (N.S.) 13	51
Hunt-Foulston *v.* Furber	3 Ch. D. 285	710
Hunter *v.* Potts	4 T. R. 182	540
Hussey *v.* Horne-Payne	4 App. Cas. 311	416
Hutchinson *v.* Shepperton	13 Q. B. 955	564
Hyde *v.* Hyde	13 P. D. 166	619

I.

Inns of Court Hotel Company, In re	Law Rep. 6 Eq. 82	180
Ionides *v.* Pacific Fire and Marine Insurance Company	Law Rep. 6 Q. B. 674	569

J.

Jackson & Co. *v.* Napper	35 Ch. D. 162; 4 Rep. Pat. Cas. at p. 59	44
Jelly, Son, & Jones's Application	51 L. J. (Ch.) 639, n.	45
Jenkinson *v.* Brandley Mining Company	19 Q. B. D. 568	627
John Welsted & Co. *v.* Swansea Bank	5 Times L. R. 332	643
Jones Lloyd & Co., In re	41 Ch. D. 159	124

		PAGE
Jones *v.* Peppercorne	Joh. 430	594
Joseph *v.* Lyons	15 Q. B. D. 280	641
Jubb *v.* Bibbs & Hill	W. N. (1883) p. 208	370

K.

Kathleen Mavourneen, In re	W. N. (1878) p. 215	2
Keate *v.* Phillips	18 Ch. D. 560	12
Kekewich *v.* Manning	1 D. M. & G. 176	87
Kelner *v.* Baxter	Law Rep. 2 C. P. 174	209, 347
Kendall *v.* Hamilton	4 App. Cas. 504	343
Kenrick *v.* Beauclerk (Lord)	3 Bos. & P. 175	262
Kent's Case	39 Ch. D. 259	124
Kettlewell *v.* Watson	26 Ch. D. 501	12
Kewny *v.* Attrill	34 Ch. D. 345	552
King *v.* George	5 Ch. D. 627	635
—— *v.* Hoare	13 M. & W. 494	353
Kinloch *v.* Secretary of State for India	7 App. Cas. 619	662
Knight *v.* Purssell	W. N. (1879) p. 182; 49 L. J. (Ch.) 120	91

L.

Lampleigh *v.* Brathwait	1 Smith's L. C. 8th Ed. pp. 151, 158	358
Lancashire Cotton Spinning Company, In re	35 Ch. D. 656	307
Lane *v.* Cotton	12 Mod. 472; 1 Ld. Raym. 646	720
Lang *v.* Smythe	7 Bing. 284	290
Layard *v.* Maud	Law Rep. 4 Eq. 397	12
Learoyd *v.* Whiteley	12 App. Cas. 727	354
Leather Cloth Company *v.* Lorsont	Law Rep. 9 Eq. 345	584
Le Chevalier *v.* Lynch	1 Doug. 170	542
Lechmer *v.* Fletcher	1 C. & M. 623	353
Lee *v.* Neuchatel Asphalte Company	41 Ch. D. 1	142
Leggott *v.* Barrett	15 Ch. D. 306	86
Leonard & Ellis's Trade Mark, In re	26 Ch. D. 288	44
Levy *v.* Abercorris Slate and Slab Company	37 Ch. D. 260	635
Lewis *v.* Nicholson	18 Q. B. 503	208
Lincoln *v.* Wright	4 De G. & J. 16	388
Lloyd's Banking Company *v.* Jones	29 Ch. D. 221	11
Lockhart *v.* Reilly	1 De G. & J. 464; 25 L. J. (Ch.) 697; 27 L. J. (Ch.) 54	345, 349
London (Mayor of), Ex parte	34 Ch. D. 452	252
London and Caledonian Marine Insurance Company, In re	11 Ch. D. 140	717
London and County Banking Company *v.* London and River Plate Bank	21 Q. B. D. 535	276
London, Bombay, and Mediterranean Bank, In re	18 Ch. D. 581	207
London Celluloid Company, In re	39 Ch. D. 190	72
London, Tilbury, and Southend Railway Company and Gower's Walk Schools, In re	24 Q. B. D. 326	286

		PAGE
Loscombe *v.* Wintringham	13 Beav. 87	380
Loughnan *v.* Barry	I. R. 6 C. L. 457	287
Luker *v.* Dennis	7 Ch. D. 227	319

M.

McAndrew *v.* Bassett	4 D. J. & S. 380	45
McIntosh *v.* Ogilvie	4 T. R. 193, n.	542
Mackay, Ex parte	Law Rep. 8 Ch. 643	638
Mackenzie's Trusts, In re	23 Ch. D. 750	399
Madras Irrigation Company, Re	Buckley on Companies Acts, 5th Ed. p. 551	228
Magdalen College Case	11 Rep. 74, b.	661
Mainwaring *v.* Beevor	8 Hare, 44	673
Mammoth Copperopolis of Utah, In re	Palmer's Co. Prec. 3rd Ed. p. 605	232
Manby *v.* Manby	3 Ch. D. 101	551
Manchester Royal Infirmary, In re	43 Ch. D. 420	425
Marine Mansions Company, In re	Law Rep. 4 Eq. 601	637
Marshall *v.* Gingell	21 Ch. D. 790	262
Matthison *v.* Clarke	3 Drew. 3	23
Maude, Ex parte	Law Rep. 6 Ch. 51	66
Maundrell *v.* Maundrell	10 Ves. 246	28
Maxfield *v.* Burton	Law Rep. 17 Eq. 15	12
Medlock, In re	55 L. J. (Ch.) 738	673
Merchant Taylors' Company, In re	30 Ch. D. 28	112
Meredith *v.* Bowen	1 Keen, 270	719
Mersey Docks *v.* Cameron	11 H. L. C. 443	661
Metropolitan Bank *v.* Heiron	5 Ex. D. 319	551
Miller *v.* Race	1 Burr. 452; Smith's L. C. 9th Ed. vol. i. p. 491	290
Mills *v.* Bowyers (Master, &c. of Society of)	3 K. & J. 66	558
—— *v.* Farmer	1 Mer. 55	381
—— *v.* Norris	5 Ves. 335	673
Milroy *v.* Lord	4 D. F. & J. 264	84
Mitchell's Estate, In re	6 Ch. D. 655	690
Moggridge *v.* Thackwell	7 Ves. 36	381
Montagu, Ex parte	1 Ch. D. 554	638
Moravian Society, In re	26 Beav. 101	604
Morgan *v.* Mather	2 Ves. 15	558
——— *v.* Stephens	3 Giff. 226	342
Mouson & Co. *v.* Boehm	26 Ch. D. 398	45
Mumford *v.* Gething	7 C. B. (N.S.) 305; 29 L. J. (C.P.) 105	583
——— *v.* Stohwasser	Law Rep. 18 Eq. 556	23
Munch's Application, Re	50 L. T. (N.S.) 12	44
Murrell *v.* Goodyear	1 D. F. & J. 422	418

N.

National Provincial Bank of England *v.* Jackson	33 Ch. D. 1	12
New Chile Gold Mining Company, In re	38 Ch. D. 475	72
Newton *v.* Newton	Law Rep. 4 Ch. 143	11, 19
Newtownards Gas Company, In re	15 L. R. Ir. 51	73

		PAGE
Nicholls *v.* Stretton	7 Beav. 42; 10 Q. B. 346	578
Nicholson *v.* Revill	4 Ad. & E. 675	343
North Western, &c. Company, In re	Palmer's Co. Prec. 3rd Ed. p. 603	223
Northern Counties of England Fire Insurance Company *v.* Whipp	26 Ch. D. 482	12
Northumberland Avenue Hotel Company, In re	33 Ch. D. 16	125, 347
Nottingham Patent Brick and Tile Company *v.* Butler	16 Q. B. D. 778	102

O.

Oaks Pits Colliery Company, In re	21 Ch. D. 322	307
Onslow *v.* Wallis	1 Mac. & G. 506; 16 Sim. 483	259, 262
Orde, In re	24 Ch. D. 271	657
Oriental Bank Corporation, In re	28 Ch. D. 643	661
Oriental Inland Steam Company, In re	Law Rep. 9 Ch. 557	717
Ormerod *v.* Todmorden Joint Stock Mill Company	8 Q. B. D. 664	488
Orr-Ewing *v.* Registrar of Trade Marks	4 App. Cas. 479	41
Ovey, In re	24 Ch. D. 560	376

P.

Pack *v.* Tarpley	9 Ad. & E. 468	148
Palmer *v.* Crauford	3 Swanst. 482	711
Palmer's (J. B.) Trade Mark, In re	24 Ch. D. 504	41
Panmure, Ex parte	24 Ch. D. 367	208
Parker *v.* Blenkhorn	14 App. Cas. 1	107
Parr *v.* Eliason	1 East, 92	37
Parsons *v.* Brand	25 Q. B. D. 110	466
Partington, Re	57 L. T. (N.S.) 654	345
Patent Ventilating Granary Company, In re	12 Ch. D. 254	652
Payne *v.* Mortimer	4 De G. & J. 447	35
Peacock *v.* Burt	4 L. J. (N.S.) (Ch.) 33	27
Peek *v.* Trinsmaran Iron Company	2 Ch. D. 115	133
Pellatt's Case	Law Rep. 2 Ch. 527	126
Perry *v.* Oriental Hotels Company	Law Rep. 5 Ch. 420	477
Perry Davis & Son *v.* Harbord	15 App. Cas. 316	44
Peto *v.* Hammond	30 Beav. 495	21
Pharmaceutical Society *v.* London and Provincial Supply Association	5 App. Cas. 857	471
Pickering *v.* Ilfracombe Railway Company	Law Rep. 3 C. P. 235	583
Pike *v.* Fitzgibbon	14 Ch. D. 837	619
Pilcher *v.* Rawlins	Law Rep. 7 Ch. 259	12
Pinder *v.* Barr	4 E. & B. 105	145
Plumb *v.* Hewitt	2 Anstr. 432	14
Plumer *v.* Gregory	Law Rep. 18 Eq. 621	347
Postmaster-General, Ex parte	10 Ch. D. 595	661
Power *v.* Hayne	Law Rep. 8 Eq. 262	711
Price *v.* Green	16 M. & W. 346	583
Priddy *v.* Rose	3 Mer. 86	350
Pritchard *v.* Draper	1 Russ. & My. 191	348

		PAGE
Prodgers *v.* Langham	Sid. 133	34
Pugh & Sharman's Case	Law Rep. 13 Eq. 566	202
Pyle Works, In re	44 Ch. D. 534	181

Q.

Quebrada Railway, Land and Copper Company, In re	40 Ch. D. 363	396

R.

Raby *v.* Ridehalgh	7 D. M. & G. 104	375
Rannie *v.* Irvine	7 Man. & G. 969	579
Ravensthorpe Local Roard *v.* Hinchcliffe	24 Q. B. D. 168	198
Read *v.* Joannon	25 Q. B. D. 300	635
Reg. *v.* Lee	4 Q. B. D. 75	53
—— *v.* McCann	Law Rep. 3 Q. B. 141	661
Rex *v.* Boston	4 East, 572	386
Rhodes *v.* Ibbetson	4 D. M. & G. 787	102
Rice *v.* Rice	2 Drew. 73	12
Richards *v.* Delbridge	Law Rep. 18 Eq. 11	86
Richards & Co., In re	11 Ch. D. 676	232
Richardson's Case	Law Rep. 19 Eq. 588	209
Rishton *v.* Grissell	Law Rep. 5 Eq. 326	140
Rivière's Trade-mark, In re	26 Ch. D. 48	44
Robarts *v.* Jefferys	8 L. J. (O.S.) (Ch.) 137	594
Roberts *v.* Croft	2 De G. & J. 1; 24 Beav. 223	11, 16
Robinson *v.* Local Board of Barton	8 App. Cas. 798	198
Robson and Railston, In re	1 B. & Ad. 723	564
Roe *v.* Baldwere	5 T. R. 104	529
Roper *v.* Roper	3 Ch. D. 714	710
Ross *v.* Army and Navy Hotel Company	34 Ch. D. 43	635
Rossiter *v.* Miller	3 App. Cas. 1124	416
Rousillon *v.* Rousillon	14 Ch. D. 351	583
Rumball *v.* Metropolitan Bank	2 Q. B. D. 194	290
Russell *v.* Kellett	3 Sm. & Giff. 264	377

S.

Sacker *v.* Bessler	4 Times L. R. 17	2
Sadler *v.* Lee	6 Beav. 330	554
Salmon, In re	42 Ch. D. 351	360
Sandys, Ex parte	42 Ch. D. 98	72, 125
Saunders *v.* Dehew	2 Vern. 271	11
Sawyer *v.* Goodwin	36 L. J. (Ch.) 578; 1 Ch. D. 351	345
Scott *v.* Scarborough (Earl of)	1 Beav. 154	673
—— *v.* Ebury (Lord)	Law Rep. 2 C. P. 255	359
Serrao *v.* Noel	15 Q. B. D. 549	343
Sharland *v.* Mildon	5 Hare, 469	348
Sharp *v.* St. Sauveur	Law Rep. 7 Ch. 343	662
Sharples *v.* Adams	32 Beav. 213	11
Shears *v.* Jacob	Law Rep. 1 C. P. 513	637
Sheffield (Earl of) *v.* London Joint Stock Bank	13 App. Cas. 333	276

		PAGE
Shepherd *v.* Ingram	Amb. 448	673
Shropshire Union Railways and Canal Company *v.* Reg.	Law Rep. 7 H. L. 496	16
Sill *v.* Worswick	1 H. Bl. 665.	540
Simpson *v.* Fogo	1 H. & M. 195	540
Slater *v.* Darlaston Steel and Iron Company	W. N. (1877) pp. 139, 165	222
Smith *v.* Anderson	15 Ch. D. 247	652
——— *v.* Reed	W. N. (1883) 196	367
——— *v.* Smith	11 C. B. (N.S.) 121	262
Smith's Estate, In re	35 Ch. D. 589	528
Solomons *v.* Bank of England	13 East, 135, n.	290
South Kensington Co-operative Stores, In re	17 Ch. D. 161	307
Spackman *v.* Plumstead District Board of Works	10 App. Cas. 229	199
Spargo's Case	Law Rep. 8 Ch. 407	119
Sparrow *v.* Hill	8 Q. B. D. 479	91
Speight *v.* Gaunt	9 App. Cas. 1	505
Spence *v.* Spence	12 C. B. (N.S.) 199	262
Spiller *v.* Maude	32 Ch. D. 158, n.	382
Spirett *v.* Willows	5 Giff. 49	35
Stamford's (Lord) Settled Estates, In re	43 Ch. D. 84	405
Standing *v.* Bowring	31 Ch. D. 282	613
Stanford, Ex parte	17 Q. B. D. 259	469
——— *v.* Roberts	26 Ch. D. 155	107
Staniar *v.* Evans	34 Ch. D. 470	347
Stanley *v.* Stanley	7 Ch. D. 589	619
Stanton *v.* Sadler	2 Vern. 30	12
Stening's Trusts, In re	50 L. T. (N.S.) 586	152
Stevenson *v.* Blakelock	1 M. & S. 535	600
Stockton Iron Furnace Company, In re	10 Ch. D. 335	637
Stokes *v.* Cheek	28 Beav. 620	710
Stoy *v.* Rees	24 Q. B. D. 748	466
Stradling *v.* Morgan	Plowd. 205, n.	646
Straker *v.* Reynolds	22 Q. B. D. 262	325
Sutton *v.* Toomer	7 B. & C. 416	570
Swift *v.* Pannell	24 Ch. D. 210	639
Symons *v.* James	1 Y. & C. (Ch.) 487	102

T.

Tailby *v.* Official Receiver	13 App. Cas. 523	641
Tanqueray-Willaume and Landau, In re	20 Ch. D. 465	266
Taylor *v.* Meads	4 D. J. & S. 597	528
——— *v.* Poncia	25 Ch. D. 646	62
Temple Bar, The	11 P. D. 6	487
Tennant, In re	40 Ch. D. 594	399
Thomas *v.* Kelly	13 App. Cas. 506	469
Thompson, In re	45 Ch. D. 161	687
Thompson *v.* Finch	8 D. M. & G. 560	347
Thorpe *v.* Holdsworth	Law Rep. 7 Eq. 139	19
Timson *v.* Wilson	38 Ch. D. 72.	488
Topham *v.* Greenside Glazed Fire Brick Company	37 Ch. D. 281	635
Tottenham *v.* Swansea Zinc Ore Company	32 W. R. 716	190, 477

		PAGE
Trafford *v.* Boehm	3 Atk. 440	349
Tunis Railways Company, In re	10 Ch. D. 270, n.; 31 L. T. (N.S.) 264	232

U.

Union Bank of London *v.* Kent	39 Ch. D. 238	11
Union Plate Glass Company, In re	42 Ch. D. 513	396
Upperton *v.* Nickolson	Law Rep. 6 Ch. 436; 10 Eq. 228	418

V.

Van Hagan, In re	16 Ch. D. 18	301
Vernon, Ewens & Co., In re	33 Ch. D. 402	17
Vulcan Ironworks Company, In re	W. N. (1885) p. 120	73

W.

Waite *v.* Littlewood	41 L. J. (Ch.) 636	425
Waldron *v.* Sloper	1 Drew, 193	15
Walker *v.* Milne	11 Beav. 507.	688
Wallwyn *v.* Lee	9 Ves. 24	19
Warde, In re	2 J. & H. 191	425
Waterlow *v.* Sharp	Law Rep. 8 Eq. 501	184
Watson *v.* Pearson	2 Ex. 581	266
——— *v.* Woodman	Law Rep. 20 Eq. 721.	551
Way's Settlement Trusts, Re	13 W. R. 149	86
Webster *v.* Davies	29 Sol. J. 372	326
Wedderburn *v.* Pickering	13 Ch. D. 769	486
Wedgwood Coal and Iron Company, In re	6 Ch. D. 627	229
Weston *v.* Savage	10 Ch. D. 736	417
Weymouth (Corporation of) *v.* Nugent	6 B. & S. 22	661
Wheatley *v.* Silkstone and Haigh Moor Coal Company	29 Ch. D. 715	641
Wheeler *v.* Gray	4 C. B. (N.S.) 584	53
Whickham, The	53 L. T. (N.S.) 236	369
White's Case	12 Ch. D. 511	126
Whitehouse, Ex parte	32 Ch. D. 512	541
Whiteley, In re	33 Ch. D. 347	505
Whittaker *v.* Kershaw	45 Ch. D. 320	620
Whitworth *v.* Gaugain	1 Ph. 728	541
Wilkinson *v.* Schneider	Law Rep. 9 Eq. 423	304
Williams *v.* Archer	5 C. B. 318	719
——— *v.* Colonial Bank	38 Ch. D. 388	276
——— *v.* Peel River Land and Mineral Company	55 L. T. (N.S.) 689	283, 719
——— *v.* Wallasey Local Board	16 Q. B. D. 718	197
Williams' Case	1 Ch. D. 576	207
Willmott *v.* London Celluloid Company	W. N. (1885) p. 29; 52 L. T. (N.S.) 642	477
———	34 Ch. D. 147	642
Wilson, In re	29 Ch. D. 790	107
——— *v.* Moore	1 My. & K. 126	353
——— *v.* Tumman	6 Man. & G. 236	347
Wilson's Case	1 H. Bl. 678	542

		PAGE
Wood *v.* Braddick	1 Taunt. 104	348
Wood's Estate, In re	31 Ch. D. 607	662
Woodford *v.* Charnley	28 Beav. 96	85
Wookey *v.* Pole	7 B. & Al. 1	289
Worrall *v.* Johnson	2 Jac. & W. 214	599
Worthington *v.* Morgan	16 Sim. 547	21
Wragg's Trade Mark, In re	29 Ch. D. 551	45
Wylson *v.* Dunn	34 Ch. D. 569	417
Wynstanley *v.* Lee	2 Sw. 333	659

Y.

Yarmouth (Corporation of) *v.* Simmons	10 Ch. D. 518	661
Yates *v.* Compton	2 P. Wms. 308	711
Yerbury's Estate, Re	62 L. T. (N.S.) 55	687
Young *v.* Wallingford	52 L. J. (Ch.) 590	348

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re THE APOLLINARIS COMPANY'S TRADE-MARKS.

C. A. 1890 Oct. 24.

Practice—Security for Costs—Appellant resident Abroad—Assets within the jurisdiction—Fluctuating Assets.

A French company appealed from an order. The Respondents applied for security for costs. The Appellants shewed that they had a branch business as mineral water merchants in *England*, which they carried on in leasehold premises, where they had a stock-in-trade worth £12,000, plant, horses, and vans worth about £1200, and a large amount of book debts. The Respondents contended that this was floating property easily removeable, and did not exempt the Appellants from giving security:—

Held, that there was no reasonable doubt that the Respondents, if the appeal was dismissed with costs, would find ample goods on which execution could be levied, and that security ought not to be ordered.

ON the 16th of April, 1886, *Ingram & Royle* gave notice of motion under the *Patents, Designs, and Trade Marks Act*, 1883, and the *Trade Marks Registration Act*, 1875, to strike out from the register two trade-marks of the *Apollinaris Company*. When the motion was opened, counsel for the *Vichy Company*, who were the owners of the business carried on in the name of *Ingram & Royle*, applied for leave to amend by substituting the name of the company for that of *Ingram & Royle*. The *Apollinaris Company* thereupon applied for security for costs, on the ground that the *Vichy Company* was a foreign company, and security to the amount of £400 was ordered. The motion was refused, with costs, and the *Vichy Company* appealed.

C. A.
1890
In re APOLLINARIS COMPANY'S TRADE-MARKS.

The *Apollinaris Company* applied for security for the costs of the appeal.

From the evidence given by the *Vichy Company* in opposition to the application, it appeared that the company was a *société anonyme*, duly constituted according to French law—that in 1885 they purchased for £12,000 the English business of mineral water merchants carried on under the firm of *Ingram & Royle*; that they carried on that business on premises in *London* held under a lease, which was alleged to be of considerable value; that they had there a stock-in-trade the value of which at cost price exceeded £12,000; that in addition thereto they owned plant, horses, and vans of the value of about £1200; that there were book debts owing to them in the *United Kingdom* of the value of upwards of £8000; and bills and cash in hand and at bankers amounting to upwards of £1000.

Neville, Q.C., and *John Cutler*, for the application:—

This is a foreign company having its office abroad, and therefore, *primâ facie*, is liable to give security for costs. It seeks to excuse itself on the ground that it has property here; but the property to have that effect ought to be, not of a floating, but of a fixed and permanent nature: *Ebrard* v. *Gassier* (1).

[FRY, L.J.:—That relates to security for costs in the Court below. Does it apply to costs of an appeal?]

The order as to security for costs of an appeal is Order LVIII., rule 15, and *Grant* v. *Banque Franco-Egyptienne* (2) decides that the fact of a company being a foreign company is a special circumstance within that rule. The head-note, which states that the residence abroad and having no assets in this country are together a special circumstance, does not correctly represent the effect of the judgment. *In re Kathleen Mavourneen* (3) supports the same view. In *Sacker* v. *Bessler* (4) security was ordered, it not being shewn that there were assets within the jurisdiction which were not readily removeable.

Warmington, Q.C., and *Sebastian*, *contrà*, were not called upon.

(1) 28 Ch. D. 232, 235.
(2) 2 C. P. D. 430.
(3) W. N. (1878) 215.
(4) 4 Times L. R. 17.

LORD HALSBURY, L.C.:—

I am of opinion that there is no ground for this motion. It seems to me that the application is made under a misapprehension of what the rule originally was, whatever its application to the Court of Appeal may be. There is no such hard and fast rule as has been suggested, that because a person is resident abroad he must necessarily give security for costs. His being so resident makes a *primâ facie* case for requiring him to give security; but it is subject to a well-known and ordinary exception that if there are goods and chattels of his in this country which are sufficient to answer the possible claim of the other litigant, and which would be available to execution, the Courts will not order him to give security for costs. Whether the same rule applies to the Court of Appeal as to the Courts of first instance, I do not think it very necessary to consider, because I am of opinion that, upon the facts of the present case, there is no ground for calling upon the *Vichy Company* to give security for costs. It is said that £12,000 worth of mineral waters may be got rid of, and that horses and carts to the extent of £1200 may be got rid of. It is perfectly true; anything may be got rid of, and even land may be sold before the day of execution. But we must apply our common sense; and when we consider the nature of the business carried on by the *Vichy Company* and the amount of stock possessed by them, it is impossible to doubt that their assets in this country will be found capable of answering any possible costs of the appeal, and therefore an order for security for costs ought not to be made.

BOWEN, L.J.:—

I agree.

FRY, L.J.:—

I agree.

Solicitors for Applicants: *Janson, Cobb & Co.*

Solicitors for the *Vichy Company: Michael Abrahams, Sons & Co.*

H. C. J.

C. A.
1889
STIRLING, J.
Nov. 27, 28;
Dec. 3.
C. A.
1890
Nov. 3.

BARNETT *v.* KING.

[1888 B. 3183.]

Bankruptcy—Future Liability—Debt provable—Covenant by Bankrupt before his Bankruptcy that his Representatives should pay Money Six Months after his Death—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 37.

The term "liability" in the 37th section of the *Bankruptcy Act*, 1883, includes a liability under a covenant for the payment of money out of the estate of the covenantor after his death, and the value of such a liability is provable as a debt in the bankruptcy of the covenantor.

By deed, dated in June, 1885, *A.* covenanted with *B.* that his executors or administrators should, within six months after his death, pay to *B.* a sum of money, with interest from his death.

In 1886 *A.* became bankrupt, and effected an arrangement with his creditors under the *Bankruptcy Act*, 1883.

After *A.*'s death, *B.*, who knew of the bankruptcy, but had not proved or made any claim in the bankruptcy proceedings, brought an action against *A.*'s executors upon the covenant contained in the deed of June, 1885.

Held by the Court of Appeal (affirming the judgment of *Stirling*, J.), that *A.*'s liability or obligation under the covenant constituted a debt provable in his bankruptcy, and that *B.*'s right of action on the covenant had been barred by the bankruptcy, and his action must be dismissed.

APPEAL from *Stirling*, J.

This was an action against the executors of the will of Sir *Richard Duckworth King*, in which the Plaintiff claimed £3000 under a covenant contained in a deed dated the 6th of June, 1885, and £97 7*s.* 11*d.* interest thereon from the 2nd of November, 1887, the day of the testator's death.

By the deed in question, which was made between the testator of the one part and the Plaintiff of the other part, after a recital that the testator had for some years past paid to the Plaintiff (who was his brother-in-law) an annuity of £78, and had agreed with the Plaintiff, as a further provision, to secure to him the sum of £3000, to be payable upon the death of the testator in manner thereinafter appearing, it was witnessed that, in pursuance of the agreement, and in consideration of the natural love and affection of the testator for the Plaintiff, he, the said testator, did thereby covenant with the Plaintiff, his executors, administrators, and assigns, that the executors or administrators of him,

the said testator, should, within six months from his death, pay to the Plaintiff, his executors, administrators, or assigns, the sum of £3000, with interest for the same at the rate of £5 per cent. per annum from the day of the death of the said testator.

In the month of February, 1886, the testator filed his petition in bankruptcy; and on the 26th of February, 1886, a receiving order was made thereupon.

The testator did not include his obligation under the deed of covenant in his statement of debts and liabilities, and the Plaintiff carried in no proof in respect thereof, although he was aware of the bankruptcy of the testator.

In answer to an interrogatory by the Defendants, the Plaintiff deposed as follows:—

"I never brought my claim to the notice of the Chief Official Receiver in Bankruptcy when or after Sir *Richard King* filed his petition in bankruptcy, or made any claim or sought to prove against the estate in bankruptcy. My reason for not doing so was that I believed that the deed was not operative or effective until six months after the death of Sir *Richard Duckworth King*. I first became aware of the proceedings in bankruptcy in the early part of 1886; but I cannot say as to my belief or otherwise."

And in the course of his cross-examination at the hearing, the Plaintiff stated that he was under an obligation to Sir *Richard King* not to mention the deed until six months after his, Sir *Richard's*, death.

A scheme of arrangement of the testator's affairs was accepted by the creditors who had proved on the 27th of August, 1886, and was approved by the Court; and an order was made sanctioning the scheme, and rescinding the receiving order on the 21st of October, 1886.

The testator died on the 2nd of November, 1887, and the Plaintiff brought this action against his executors on the 26th of June, 1888.

One of the defences to the action was that the obligation of the testator, under his covenant in the deed of the 6th of June, 1885, was a debt or liability provable in his bankruptcy, and

C. A. 1890 BARNETT v. KING.

that any right of action upon the covenant which the Plaintiff might otherwise have had was barred by the bankruptcy proceedings.

The action came on for hearing before Mr. Justice *Stirling* on the 27th of November, 1889.

The Plaintiff appeared in person during the first portion of the hearing, and afterwards

Woodroffe appeared for the Plaintiff.

Hastings, Q.C., and *John Henderson*, for the Defendants, relied on *Hardy* v. *Fothergill* (1).

STIRLING, J.:—

I am of opinion that this is a debt which falls within the 37th section of the *Bankruptcy Act*, 1883. It seems to me that the covenant is an express engagement, within the words of that section, either "to pay, or capable of resulting in the payment of money, or monies worth," (the words, it is to be observed, are general) "whether the payment is, as respects amount fixed or unliquidated; as respects time present or future." And there is, as is also to be observed, nothing in the section which defines that future time, for it may be "certain or dependent upon any one contingency, or on two or more contingencies." Therefore, it seems to me that this covenant falls within the 37th section, and that any proceedings upon it are barred by the bankruptcy. On that ground I dismiss the action with costs.

The Plaintiff appealed. The appeal was heard on the 3rd of November, 1890.

Cautley (*Herbert Reed*, with him), for the Appellant:—

Only such debts, liabilities, or obligations as are capable of proof against the debtor himself, and would be affected by proceedings in his bankruptcy, are within the meaning of sect. 37 of the *Bankruptcy Act* of 1883; and therefore a liability or obligation to which he could not be subject during his life, and which could only arise six months after his death, is not within

(1) 13 App. Cas. 351.

that section, and the proceedings in Bankruptcy are no bar to the Plaintiff's action.

Hastings, Q.C., and *John Henderson*, for the Respondents, were not called upon.

SIR JAMES HANNEN:—

We are of opinion that this appeal fails.

The question seems to resolve itself into whether or not this liability or obligation to pay a sum of money out of the estate of the deceased, six months after his death, is a liability within the meaning of the 37th section of the *Bankruptcy Act* of 1883. It is argued that the meaning of the section is, that only such liabilities are capable of proof, as relate to the debtor himself; and that liabilities which will only arise after his death are not within the meaning of the section.

I am of opinion that that is too narrow a construction to put upon the words of the Act, and that the true meaning of the section is not merely a liability or obligation, or a possibility of liability or obligation to pay money on the part of the obligor himself, but that it includes a liability or obligation for the payment of money out of his estate. I think that the observation which was made by Lord Justice *Fry* in the course of the argument is an exceedingly strong one. Supposing the narrow view to be the correct one, the effect would be, that if the Plaintiff, the holder of this deed, had taken the steps proper to be taken in the bankruptcy, he could not have proved in respect of this liability under the Act of 1883. That is plainly, to my mind, an unreasonable conclusion to arrive at. I therefore think that the decision of Mr. Justice *Stirling* on the point is correct, and that this appeal must be dismissed with costs.

BOWEN, L.J.:—

I am of the same opinion.

FRY, L.J.:—

I agree.

Solicitors: *Latham, Farmer & Co.; Dawes & Sons.*

W. W. K.

C. A.
1890
KAY, J.
June 10, 11, 19.
C. A.
Nov. 5, 6, 20.

TAYLOR *v.* RUSSELL.

[1889 T. 131.]

Mortgage—Priorities—Equitable Mortgagees—Fraud of Mortgagor—Title Deeds—Legal Estate—Negligence.

W. made a legal mortgage of an estate together with other property, and afterwards sold the estate to *T.*, without notice of the mortgage, which appeared to have been forgotten, and handed the title-deeds to him. *T.*, under a forged title, made an equitable mortgage of the estate to the Plaintiff (who believed that he had a good legal mortgage), and handed the forged title-deed to him. *T.* then made a second equitable mortgage, under the true title, to the Defendant (who also thought he had a legal mortgage), and handed the genuine title-deeds to him. Neither the Plaintiff nor the Defendant had, at the date of their respective securities, any notice of the prior legal mortgage; and the Defendant had no notice of the Plaintiff's mortgage. Afterwards the Defendant discovered the existence of the Plaintiff's mortgage and of the prior legal mortgage, and induced the legal mortgagees to reconvey the legal estate by a voluntary deed to *W.* freed from their mortgage (the remaining property being sufficient for their security) on the express condition that *W.* should convey it to the Defendant, which he accordingly did, although he had at that time notice of the Plaintiff's mortgage. In an action by the Plaintiff, as first mortgagee, to establish his priority over the second mortgagee:—

Held (reversing the decision of *Kay*, J.), that there was nothing in the circumstances under which the second equitable mortgagee obtained the legal estate to disentitle him to the protection thereby afforded, and that he was therefore entitled to priority over the first equitable mortgagee.

For a trust or equity to affect the conscience of a person who gets in the legal estate, it must be a trust or equity in favour of the person against whom the legal estate is set up, not in favour of a third party.

Harpham v. *Shacklock* (1) explained.

Per Kay, J.:—In the case of two innocent persons taking equitable mortgages from a fraudulent mortgagor, mere carelessness or want of prudence on the part of the first mortgagee in taking his security is not sufficient to postpone him to the second; for that purpose the negligence must be "gross"—that is, so great as to make the first mortgagee responsible for the fraud committed on the second mortgagee; and, *semble*, the amount of negligence necessary to postpone a first mortgagee is the same whether his mortgage is legal or equitable.

IN 1881 *Thomas Toward*, a builder, mortgaged to the Plaintiffs certain property at *New Shildon*, in the county of *Durham*, which he had purchased from the trustees of the will of *Samuel*

(1) 19 Ch. D. 207.

Smithson. On that occasion the title was investigated, and amongst other requisitions was one as to the identity of the property with property held by *Smithson.* This was answered somewhat vaguely by a statement to the effect that it was matter of notoriety in the neighbourhood that it had been *Smithson's* land.

In January, 1883, *Toward* applied to the Plaintiffs for a further advance of £2500 on the security of other property, consisting of a plot of land at *Old Shildon*, somewhat less than a quarter of a mile distant from that comprised in the former mortgage, and he brought to the Plaintiffs' solicitors, who had acted in the matter of the former mortgage, an abstract of his title, which purported to be a conveyance of the 3rd of November, 1882, by *Smithson's* trustees and the tenant for life under *Smithson's* will to himself. On that occasion *Toward* stated that he was content that the Plaintiffs' solicitors should act for both parties; and they accordingly examined the abstract with the deed, and having before dealt with *Toward*, and believing him to be perfectly honest, they did not make any requisition as to the identity of the property. The transaction was thereupon carried out by a mortgage dated the 15th of February, 1883, which described the property accurately and contained a conveyance by *Toward* as beneficial owner, and it referred to the plan on the deed of the 3rd of November, 1882, which deed was, on the execution of the mortgage, handed over to the Plaintiffs as mortgagees. The deed of the 3rd of November, 1882, was, in fact, a forgery. The property never belonged to *Smithson* or his trustees, but it had belonged to the trustees of a person named *Robert Surtees.*

Robert Surtees, by his will, gave certain land, including the property in question, to two trustees, *Maude* and *Wilkinson*, to legal uses in strict settlement, and conferred on the trustees powers of sale and mortgaging, and of revoking and appointing uses to carry any sale or mortgage into effect. The trustees had mortgaged the property in question with other property on the 19th of November, 1862, by a legal mortgage to the trustees of Sir *F. Legard* for £9000; but *Toward* had purchased it from *Wilkinson, Surtees'* surviving trustee, without notice of the legal mortgage, and it had been conveyed to him on the 30th of

C. A. 1890 TAYLOR v. RUSSELL.

January, 1883, by a deed of that date, which recited a contract to sell to him the fee simple free from incumbrances, and contained the usual covenant by the trustee, that he had not incumbered the property. On the execution of the conveyance the title-deeds were handed over to *Toward*. The conveying trustee was one of those who had mortgaged the property to *Legard's* trustees on the 19th of November, 1862; but that mortgage was not mentioned in the conveyance. The conveyance to *Toward* of the 30th of January, 1883, thus vested in him the equitable fee simple, with a right to call upon *Surtees'* trustees for the legal estate free from incumbrances; and it was admitted that whatever estate and rights in respect of the property *Toward* had when he made the mortgage of the 15th of February, 1883, passed in equity by that deed to the Plaintiffs.

The Defendants' title was under a deed of the 20th of October, 1887, by which *Toward* mortgaged the plot of land to them for £2500. On that occasion his real title under *Surtees'* trustees was disclosed, and the title-deeds, including the conveyance of the 30th of January, 1883, were handed over; but *Legard's* trustees did not join, so that nothing passed to the Defendants except an equitable estate.

The only explanation of the fact that the title-deeds had remained in the possession of *Surtees'* trustees, notwithstanding the mortgage to *Legard's* trustees, appeared to be that the property was not intended to be included in the mortgage to *Legard's* trustees, but had been so included inadvertently.

In the year 1888 *Toward* absconded, and the Defendants, having become aware of the mortgage to the Plaintiffs and also of the mortgage to *Legard's* trustees, induced *Legard's* trustees, on the 21st of November, 1888, to reconvey this plot of land by a voluntary deed to *Surtees'* trustees, *Legard's* trustees being satisfied with the security of the rest of the property comprised in their mortgage, upon which £6000 then remained due, upon the express condition that the *Surtees'* trustees should forthwith convey the same to the Defendants; and on the 26th of the same month *Surtees'* trustees, though on the 21st they had been informed of the Plaintiffs' mortgage, conveyed the plot of land to the Defendants.

The Plaintiffs brought this action claiming a declaration that they were first mortgagees, and to have their security of the 15th of February, 1883, realized.

The action came on for hearing before Mr. Justice *Kay* on the 10th of June, 1890.

Haldane, Q.C., and *Levett*, for the Plaintiffs :—

The Plaintiffs' title, as first equitable mortgagees, should prevail. They or their solicitors were not, under the circumstances, guilty of such negligence in trusting to *Toward*, as to postpone them to the Defendants: *Dixon* v. *Muckleston* (1); *Roberts* v. *Croft* (2); *Hunt* v. *Elmes* (3); *Lloyd's Banking Company* v. *Jones* (4); *Union Bank of London* v. *Kent* (5); *Hewitt* v. *Loosemore* (6).

The Defendants cannot strengthen their later equitable title by obtaining the legal estate from *Surtees'* trustees, who were trustees of it for the Plaintiffs, having notice of their rights. The priorities of equitable incumbrancers cannot be altered by one of them getting in the legal estate from a person who is a trustee for them all: *Harpham* v. *Shacklock* (7); *Sharples* v. *Adams* (8); *Saunders* v. *Dehew* (9).

The Plaintiffs, being entitled to priority, are also entitled to the possession of the title-deeds: *Newton* v. *Newton* (10).

Renshaw, Q.C., and *J. Scott Fox*, for the Defendants :—

The Plaintiffs were guilty of negligence in taking no other abstract of title than that of the forged deed of conveyance, which only purported to be three months old, and in not making proper inquiries as to the identity of the property. Had they insisted either on a proper abstract of the earlier title or on proper evidence of identity, they would have discovered that the property had never belonged to *Smithson*, but to *Surtees*, and the forgery would have come to light, and no mortgage would ever have been made to the Plaintiffs. As it was, the Plaintiffs got their equitable

(1) Law Rep. 8 Ch. 155, 159.
(2) 2 De G. & J. 1; 24 Beav. 223.
(3) 2 D. F. & J. 578.
(4) 29 Ch. D. 221.
(5) 39 Ch. D. 238.
(6) 9 Hare, 449.
(7) 19 Ch. D. 207.
(8) 32 Beav. 213, 216.
(9) 2 Vern. 271.
(10) Law Rep. 4 Ch. 143.

C. A. 1890 TAYLOR v. RUSSELL.

title by mere accident, and not under the forgery which they trusted, while the genuine title-deeds were left under the control of *Toward*, who was thus armed with the power of committing a fraud on the Defendants; and the Defendants, having obtained the deeds from him as purchasers for value without notice, are entitled to all the advantage of priority which the possession of title-deeds confers. Such negligence as that shewn by the Plaintiffs would, we submit, have sufficed to postpone a prior legal estate; it is certainly enough to postpone a prior equitable estate, which will be postponed for a degree of negligence less than would be required to postpone a prior legal estate: *Northern Counties of England Fire Insurance Company* v. *Whipp* (1); *Rice* v. *Rice* (2); *Layard* v. *Maud* (3); *National Provincial Bank of England* v. *Jackson* (4); *Farrand* v. *Yorkshire Banking Company* (5); *Hewitt* v. *Loosemore* (6); *Hunt* v. *Elmes* (7); *Colyer* v. *Finch* (8); *Kettlewell* v. *Watson* (9); *Union Bank of London* v. *Kent* (10); *Maxfield* v. *Burton* (11); *Keate* v. *Phillips* (12). The cases relied on by Lord *Selborne* in *Dixon* v. *Muckleston* (13) did not relate to a contract between equitable mortgagees.

Secondly, the Defendants are entitled to rely on the legal estate, though got in after notice of the Plaintiffs' claim and without consideration, according to the doctrine of tacking: *Edmunds* v. *Povey* (14); *Stanton* v. *Sadler* (15); *Saunders* v. *Dehew* (16); *Belchier* v. *Butler* (17); and *Goleborn* v. *Alcock* (18), where an outstanding term, which was got in after action brought and without consideration, was held to be a protection. This doctrine has been recognised by the Court of Appeal in *Pilcher* v. *Rawlins* (19), and by the Privy Council in *Blackwood* v. *London Chartered Bank of Australia* (20). *Harpham* v. *Shacklock* (21)

(1) 26 Ch. D. 482.
(2) 2 Drew. 73.
(3) Law Rep. 4 Eq. 397.
(4) 33 Ch. D. 1.
(5) 40 Ch. D. 182.
(6) 9 Hare, 449.
(7) 2 D. F. & J. 578.
(8) 5 H. L. C. 905.
(9) 26 Ch. D. 501.
(10) 39 Ch. D. 238, 245.
(11) Law Rep. 17 Eq. 15.
(12) 18 Ch. D. 560.
(13) Law Rep. 8 Ch. 155, 161.
(14) 1 Vern. 187.
(15) 2 Vern. 30.
(16) Ibid. 271.
(17) 1 Eden, 523.
(18) 2 Sim. 552.
(19) Law Rep. 7 Ch. 259, 268.
(20) Ibid. 5 P. C. 92, 111.
(21) 19 Ch. D. 207.

does not cover this case; for there the original mortgagee was satisfied, the mortgagee being a bare trustee at the time the legal estate was got in from him; whereas here *Legard's* trustees, when they conveyed the legal estate by the deed of the 21st of November, 1888, were not in the position of bare trustees, for £6000 remained due to them on their mortgage.

Haldane, in reply:—

First, the suggested distinction between the degrees of negligence sufficient to postpone a legal and equitable estate respectively is unsound: *Cory* v. *Eyre* (1).

Secondly, this is not a case of tacking. *Surtees'* trustees, having obtained the legal estate from *Legard's* trustees, were trustees of it for the person who had the best right to call for it—that is, the Plaintiffs; and the Defendants themselves, having notice of this trust in the Plaintiffs' favour, could not better themselves by obtaining the legal estate from *Surtees'* trustees, even if the latter had not themselves had notice also; for a person purchasing from a trustee, with knowledge of the trust, becomes himself a trustee: *Allen* v. *Knight* (2). But it is clear that from the 21st of November to the 26th of November, 1888, *Surtees'* trustees did know that they were trustees for the Plaintiffs, and yet on the latter date they conveyed the legal estate to the Defendants. There is no authority that a person is entitled to go and buy in a legal estate from a person who holds it as trustee for another.

1890. June 19. KAY, J. (after stating the facts, continued):—

The property not being sufficient to pay both mortgages, the question which is to be first is important. The case was very well argued by Mr. *Scott Fox*. It was contended that the Plaintiffs' security must be postponed to the Defendants, not because of any act done by the Plaintiffs, but because they were guilty of negligence, which, it was urged, was sufficient to deprive them of their *primâ facie* right to priority. The argument rested mainly on a distinction between the position of a first mortgagee who has an equitable estate and that of a mortgagee whose estate

(1) 1 D. J. & S. 149, 167. (2) 5 Hare, 272.

C. A. 1890 TAYLOR v. RUSSELL. Kay, J.

is legal. In the latter case the doctrine of the Court is thus stated in *Plumb* v. *Fluitt* (1): "Nothing but fraud, or gross and voluntary negligence in leaving the title-deeds, will oust the priority of the legal claimant." This doctrine was accepted by Lord *Eldon* in *Evans* v. *Bicknell* (2), and was re-stated in like terms by Lord Justice *Turner* in *Hewitt* v. *Loosemore* (3), and has always been recognised as the undoubted law on the subject. In the last-mentioned case Lord Justice *Turner* says, in effect, that such negligence will be imputed to the legal mortgagee if he omits all inquiry as to the deeds, but not if he has inquired and a reasonable excuse is given for their non-delivery. But it was argued that a much smaller amount of negligence was sufficient to postpone a mortgagee whose estate is only equitable. That proposition, stated in other words, is that a Court of Equity would deprive a mortgagee of an advantage which is less than the legal estate much more readily and easily than it would deprive him of the legal estate. From the mortgagee's point of view it is difficult to see any justice or reasonable principle for this. He says: "I want my money; whether you take from me the legal estate, or only an equitable estate, the effect is to me precisely the same: you take from me the money I have advanced. If I have the legal estate equity will not deprive me of my money on the ground of negligence unless it be 'gross and wilful.' Why should it deprive me of it for less negligence when I have the first equitable estate which *primâ facie* entitles me to priority as much as the possession of the legal estate would do?" The doctrine, however, it was contended, is settled by authority; and reference was made to the judgment of the Court of Appeal in *Northern Counties of England Fire Insurance Company* v. *Whipp* (4), where it is said (5): "The question is not what circumstances may as between two equities give priority to the one over the other, but what circumstances justify the Court in depriving a legal mortgagee of the benefit of the legal estate"; and, again (6): "The Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any

(1) 2 Anstr. 432, 440.
(2) 6 Ves. 174.
(3) 9 Hare, 449.
(4) 26 Ch. D. 482.
(5) Ibid. 487.
(6) Ibid. 494.

mere carelessness or want of prudence on the part of the legal owner."

From these words and an observation during the argument, that the case of *Waldron* v. *Sloper* (1) was a contest between equitable incumbrancers, the conclusion has been drawn by the Defendants' counsel that it was the view of the Court of Appeal that gross negligence must be proved in order to postpone the legal mortgagee, but that a much less amount of negligence, such as "mere carelessness or want of prudence," would suffice to postpone the first of two equitable mortgagees. I do not think that this is the true meaning of that judgment. The Court was not dealing with a contest between two equitable mortgagees, nor attempting to define the amount of negligence necessary in such a case, but merely emphasizing the fact that the estate which it was called upon to displace was legal, and not equitable. No doubt Courts of Equity have always manifested great reluctance to deprive a mortgagee or other purchaser of the legal estate; but so they have also when the attempt has been to displace the first of two equitable mortgagees. I have not found any case of authority in which this has been done on the ground of negligence that was not "gross"—that is, so great as to make the prior mortgagee responsible for the fraud committed on the subsequent mortgagee. This seems to me to be the accurate statement of the rule as between two equitable mortgagees; and for this view of the law there is positive and very high authority.

In *Cory* v. *Eyre* (2), Lord Justice *Turner* says (3): "Questions of priority between equitable incumbrancers (and the incumbrances both of the plaintiffs and of the defendants in this case are equitable, the legal estate being, as has been stated, outstanding) are in general governed by the rule *qui prior est tempore potior est jure*, and in determining cases depending on the rule we must of course look at the principle on which the rule is founded. It is founded, as I conceive, on this principle, that the creation or declaration of a trust vests an estate and interest in the subject-matter of the trust in the person in whose favour the trust is created or declared. Where, therefore, it is sought, as in the present case, to postpone an equitable title

(1) 1 Drew. 193. (2) 1 D. J. & S. 149. (3) 1 D. J. & S. 167.

C. A. 1890 TAYLOR v. RUSSELL. Kay, J.

created by declaration of trust, there is an estate or interest to be displaced. No doubt there may be cases so strong as to justify this being done, but there can be as little doubt that a strong case must be required to justify it. A vested estate or interest ought not to be disturbed upon any light grounds."

In *Shropshire Union Railways and Canal Company* v. *Reg.* (1), Lord *Cairns* says (2): "But I conceive it to be clear and undoubted law, and law the enforcement of which is required for the safety of mankind, that, in order to take away any pre-existing admitted equitable title, that which is relied upon for such a purpose must be shewn and proved by those upon whom the burden to shew and prove it lies, and that it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced."

In *Roberts* v. *Croft* (3), Lord *Cranworth*, dealing with a contest between two equitable mortgagees, says that the former, when she took her security, acquired a right which was good against all other merely equitable claimants, unless she was guilty of gross negligence enabling the mortgagor to commit a fraud by holding himself out as unincumbered holder of the property.

In *Dixon* v. *Muckleston* (4), Lord *Selborne* treats the rule—that negligence, to postpone the mortgagee, must be "gross and wilful negligence which in the eye of this Court amounts to fraud"—as applicable between two equitable mortgagees; and he says, in effect, that where deeds were deposited which were stated in writing by the mortgagor to be the title-deeds of a certain property, and to be deposited as security—whether those were all the deeds or only part of the deeds, or had not been truly deeds relating to that estate at all—as between the mortgagor who had signed such a statement, and those claiming under him on the one side, and the mortgagee on the other, a good equitable security would be created which they "would be estopped from at any time whatever disputing"; and for this his Lordship refers, amongst other cases, to *Hunt* v. *Elmes* (5), *Colyer* v. *Finch* (6), and

(1) Law Rep. 7 H. L. 496.
(2) Ibid. 507.
(3) 2 De G. & J. 1.
(4) Law Rep. 8 Ch. 155, 161.
(5) 2 D. F. & J. 578.
(6) 5 H. L. C. 905.

to the statement of the law in *Hewitt* v. *Loosemore* (1), all of which were cases of legal mortgages.

These are not *obiter dicta*, but the carefully worded reasons on which some of the most eminent of modern judges based their decisions in the cases I have referred to in the Court of Appeal in Chancery, and in the House of Lords. Nothing short of a decision of the House of Lords can overrule the law so laid down.

Great reliance was placed in argument upon the judgment in *Rice* v. *Rice* (2), where Vice-Chancellor *Kindersley* says (3), that "in a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to." In that case the claimant was a vendor who had conveyed the estate without receiving his purchase-money, and was seeking to establish an equitable lien for it against a subsequent mortgagee by deposit of the conveyance which had upon it a receipt for the purchase-money signed by the vendor, who had thus armed the purchaser with the means of committing a fraud upon the depositee. No one can object to the decision; but the doctrine as above stated by Vice-Chancellor *Kindersley* has not been accepted. The case was cited in each of those from which I have just quoted, and the language used by Lord Justice *Turner* in *Cory* v. *Eyre* (4) seems expressly addressed to answer the observations of Vice-Chancellor *Kindersley*. It has also been remarked upon in *In re Vernon, Ewens & Co.* (5), and in *Union Bank of London* v. *Kent* (6). In the last-mentioned cases many of the decisions in contests between two equitable mortgagees are discussed and explained. In each of those decisions in which a prior equitable mortgagee was displaced for negligence, the negligence was such as, according to the definition given in the cases I have referred to, would have been sufficient to postpone a mortgagee who had the legal estate.

I conclude, therefore, that the negligence necessary to postpone the first equitable mortgagee in such a case as the present must be so gross as to render him responsible for the fraud committed upon the second mortgagee.

(1) 9 Hare, 449.
(2) 2 Drew. 73.
(3) Ibid. 78.
(4) 1 D. J. & S. 149, 167.
(5) 33 Ch. D. 402, 408.
(6) 39 Ch. D. 238, 245.

C. A. 1890 TAYLOR v. RUSSELL. Kay, J.

The next question is, was there sufficient negligence in this case on the part of the Plaintiffs? They intended to have, and had every reason to believe they were obtaining, a perfectly good legal mortgage. If the legal estate had passed, it would have been impossible, I think, to deprive them of it at the instance of the Defendants. The negligence of which they are accused was omitting to make a requisition as to the property having been at one time owned by *Smithson*. If they had done this, it is said, the forgery of the deed of the 3rd of November, 1882, would have been discovered. But would it? If by requisition is meant exhausting all means of information by applying to *Smithson's* trustees, inquiring in the neighbourhood, and the like, that might have been the result. But the requisition which a purchaser usually makes is a question asked of the vendor or his solicitors. Unless he has reason for suspicion it is not usual to do more; and if he gets a satisfactory answer he does not inquire further, and he cannot be truly said to be guilty of gross negligence if he is so satisfied. In this case the mortgagor had not a separate solicitor: the question, if asked, must have been asked of him, the mortgagor. But it was anticipated, so far as he was concerned, by production of the forged deed, which he produced as genuine, and which the Plaintiffs' solicitors had no reason in the world to doubt. Therefore, to my mind, this, if negligence, was not gross negligence—was not such negligence as would have postponed the Plaintiffs if the legal estate had passed to them by the deed of mortgage, and was not such negligence as made them responsible in the view of a Court of Equity for the fraud subsequently committed by the mortgagor upon the Defendants. Lord *Selborne*, in *Dixon* v. *Muckleston* (1), held that an equitable mortgagee, receiving a parcel which the mortgagor stated in writing to contain the title-deeds of the estate upon which he by that writing contracted to give security, could not be postponed to a subsequent mortgagee by deposit of the real title-deeds. Even if the parcel did not contain any of the title-deeds, and he, trusting to the mortgagor's statement, never examined it, such negligence would not be sufficiently gross to postpone him. That would be greater negligence than can be imputed to the Plaintiffs in this case.

(1) Law Rep. 8 Ch. 155, 161.

I think myself bound by principle and authority to hold that the Plaintiffs cannot be postponed on the ground of negligence.

Then, does the possession of the title-deeds confer upon the Defendants an advantage in respect of which they are entitled to plead that they are purchasers for value without notice? There has been some fluctuation of opinion on this point. Lord *Cranworth*, in *Colyer* v. *Finch* (1), says that the principle on which the Court protects a purchaser for value without notice is not confined to cases where the person who sets it up has the legal estate.

In *Thorpe* v. *Holdsworth* (2) Vice-Chancellor *Giffard* thought the question a difficult one; but, having established the priority of the first equitable mortgagee, he directed a sale to raise his charge, and that the second mortgagee, who had the deeds, should produce them for the purpose of such sale. But in *Newton* v. *Newton* (3), where the claim was to have a trust fund of £2000 raised out of an estate in priority to an equitable mortgage by deposit of the mortgage deed by which the fund had been secured to the trustee who had advanced the trust-money to the mortgagor, the Lord Chancellor held that, where the equitable right was established against the defendant having the deeds, the decree should go on to order them to be delivered up, distinguishing *Wallwyn* v. *Lee* (4), and like cases, on the ground that the sole object in them was to recover the deeds, and not to determine the right to the estate, but when the right to the estate was decided it would confer the right to the possession of the deeds.

Another point insisted upon was that the legal estate which the Defendants have got in will protect them against the Plaintiffs' claim. But if this was obtained from some one who was trustee for the persons beneficially interested, and who knew of the Plaintiffs' claim, it is quite clear it will not protect the Defendants.

I have pointed out that by the conveyance by *Surtees'* trustees to *Toward* of the 30th of January, 1883, it appears that the contract with them was to convey the fee simple free from

(1) 5 H. L. C. 905, 920.
(2) Law Rep. 7 Eq. 139.
(3) Law Rep. 4 Ch. 143.
(4) 9 Ves. 24.

C. A. 1890 TAYLOR v. RUSSELL. Kay, J.

incumbrances. When *Surtees'* trustees obtained the legal estate after this conveyance, there was a duty incumbent upon them to convey it to *Toward*, or to the assign of *Toward* who had the best right to call for it. In that sense they were trustees for such assign. Any conveyance by them to another person would be a breach of such trust, and the Defendants could not obtain an advantage by availing themselves of such a breach of trust. I have spoken of trustees; I believe, in fact there was only one trustee at the time of these transactions.

In *Harpham* v. *Shacklock* (1) copyholds had been mortgaged in 1850 by conditional surrender, without admittance, to one *Peck*. In 1876 the owner of the equity of redemption mortgaged to *Pritchard*. In 1877 *Peck* and the owner mortgaged to *Shacklock*, *Peck* being paid off. *Shacklock* deposited this mortgage, and the documents obtained from *Peck*, with his bankers to secure an advance; and about the same time he handed some of the other title-deeds to the plaintiff, for whom *Shacklock* was trustee of the mortgage of 1877. After they knew of the plaintiff's claim the bankers procured *Peck* to be admitted under his conditional surrender of 1850, and he surrendered to them, and they were admitted. In the Court of Appeal Sir *G. Jessel* said (2): "Then, as regards the legal estate, nothing is better settled than that you cannot make use of the doctrine of *tabula in naufragio* by getting in a legal estate from a bare trustee after you have received notice of a prior equitable claim. If *Peck* knew of the claim, it was a wilful breach of trust in him to surrender to the bankers; if he did not know of it, the bankers did, and knew that they were inducing him to commit a breach of trust by getting him to hand over the legal estate. The appellant's case therefore fails, and the appeal must be dismissed with costs."

I must, therefore, hold that the Plaintiffs are entitled to priority.

With reference to costs, the case is a very hard one; and I do not think it right to do more than to allow each party to add his costs to his debt, without interest upon such costs.

There must be a declaration that the Plaintiffs have the first charge; the usual accounts, a decree for sale, and a direction

(1) 19 Ch. D. 207. (2) 19 Ch. D. 214.

that the costs be added to the debt, but without interest; and that the title-deeds be delivered to the Plaintiffs.

G. I. F. C.

C. A. 1890 TAYLOR v. RUSSELL. C. A.

From this decision the Defendants appealed. The appeal came on for hearing on the 5th of November, 1890.

J. Scott Fox, for the Appellants :—

We contend, first, that there was such negligence on the part of the Plaintiffs as would postpone them to us if the case were only between two equities; and, secondly, that, even if that be not so, the possession of the legal estate gives us priority.

[As to the first point, the following cases were referred to; but the Court did not decide it: *Northern Counties of England Fire Insurance Company* v. *Whipp* (1); *Waldron* v. *Sloper* (2); *Peto* v. *Hammond* (3); *National Provincial Bank of England* v. *Jackson* (4); *Farrand* v. *Yorkshire Banking Company* (5); *Rice* v. *Rice* (6); *Cory* v. *Eyre* (7); *Dixon* v. *Muckleston* (8); *Roberts* v. *Croft* (9); *Shropshire Union Railways and Canal Company* v. *Reg.* (10); *Worthington* v. *Morgan* (11).]

[FRY, L.J., referred to *Bickerton* v. *Walker* (12).]

As to the Defendants having the legal estate and the possession of the title-deeds. In *Blackwood* v. *London Chartered Bank of Australia* (13), the general principle is laid down that a man who has *bonâ fide* paid money without notice of any other title, though he gets nothing but an equitable title, may afterwards get in a legal title if he can, and may hold it, though during the interval between the payment and the getting in the legal title, he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself. The only qualification to this is that the legal estate must not be got in by joining with a trustee in a breach of trust. The text-

(1) 26 Ch. D. 482.
(2) 1 Drew. 193, 200.
(3) 30 Beav. 495.
(4) 33 Ch. D. 1.
(5) 40 Ch. D. 182.
(6) 2 Drew. 73.
(7) 1 D. J. & S. 149.
(8) Law Rep. 8 Ch. 155.
(9) 2 De G. & J. 1.
(10) Law Rep. 7 H. L. 496.
(11) 16 Sim. 547.
(12) 31 Ch. D. 151.
(13) Law Rep. 5 P. C. 92, 111.

C. A. 1890 TAYLOR v. RUSSELL.

books all state that the legal estate may be got in as a protection after notice of the adverse title. In *Bates* v. *Johnson* (1) Lord *Hatherley* (2) discusses the result of the authorities, and says there is no case where it has been held that where a trustee of a satisfied term or a satisfied mortgagee, conveys to a purchaser, such trustee or mortgagee having notice of an intervening charge or trust, the purchaser can protect himself by the legal estate so obtained, but that there is no decision that he cannot.

[FRY, L.J.:—Has the purchaser ever been held protected where no consideration passed on the transfer of the legal estate?]

Yes. *Churchil* v. *Grove* (3); *Holt* v. *Mill* (4); *Stanton* v. *Sadler* (5); *Wallwyn* v. *Lee* (6), shew that the merits of the purchaser depend on his having no notice when he paid his purchase-money, not on his paying a consideration when he gets the legal estate. *Goleborn* v. *Alcock* (7) decides the precise point that the absence of consideration for the transfer of the legal estate is of no importance. It was decided in *Harpham* v. *Shacklock* (8) that an equitable incumbrancer cannot, after receiving notice of a prior incumbrance, obtain priority over it by getting in a legal estate from a bare trustee; but *Dodds* v. *Hills* (9) is in my favour; and in *Pilcher* v. *Rawlins* (10), *James*, L.J., though stating that he could not understand the principle of the cases where a person after notice acquired priority by a conveyance from a trustee, does not shew any doubt that those cases were binding on him, and Lord *Hatherley* also admits their authority. But I say that this is not the case of a conveyance by a bare trustee. *Legard's* trustees, when they conveyed the legal estate in this property, were unsatisfied mortgagees; they were amply secured, and were willing to release this property from their security, and they conveyed it on the express bargain that it should be conveyed to the Defendants, which puts the matter on the same footing as if the unsatisfied mortgagees had conveyed directly to the Defendants.

(1) Joh. 304.
(2) Ibid. 315, 316.
(3) 1 Ch. Cas. 35.
(4) 2 Vern. 279; 1 Eq. Ca. Ab. 229.
(5) 2 Vern. 30.
(6) 9 Ves. 24.
(7) 2 Sim. 552.
(8) 19 Ch. D. 207.
(9) 2 H. & M. 424.
(10) Law Rep. 7 Ch. 259.

Levett (*Haldane*, Q.C., with him), for the Plaintiffs:—

The Defendants cannot protect themselves by the possession of the legal estate, which was made to them without consideration. It is argued, indeed, that the conveyance was not voluntary, but was made in consequence of a bargain by which the *Surtees* trustees were bound. But as between us and the *Surtees* trustees we are absolute unincumbered owners, and they could not have any right to convey the legal estate so as to prejudice us. In conveying it to the Defendants they were violating a prior obligation. They were bound by the covenant against incumbrances contained in *Toward's* purchase-deed, and as soon as they got the legal estate they were trustees of it for us. They were bound to make good their covenant; and it was a breach of trust on their part to convey it to the Defendants. Moreover, the *Surtees* trustees had no power under their settlement to deal with the legal estate in that way. They had only powers of sale and mortgage. The legal estate was reconveyed to them upon the trusts of *Surtees'* will, which were exhausted so far as this property was concerned, and they could only hold it as bare trustees for the purchasers who had the best equity to it. A second mortgagee cannot gain priority by getting the legal estate from a bare trustee: *Harpham* v. *Shacklock* (1). But we also contend that the re-conveyance of the legal estate to the *Surtees* trustees by the *Legard* trustees, under these circumstances, was a breach of trust of which the Defendants cannot take advantage: *Mumford* v. *Stohwasser* (2); *Allen* v. *Knight* (3). A mortgagee is trustee for the person entitled to the equity of redemption, subject only to securing his own debt: *Matthison* v. *Clarke* (4). In equity the mortgagor is still owner, and the mortgagee can only part with the estate and get rid of his responsibility to the mortgagor in two ways—by selling under his power of sale, or by assigning his debt and the estate with it to a transferee. He has no power to transfer the property to a third party without transferring the debt also. If the Defendants had taken a transfer of the first mortgagees' debt they might have gained priority; but the first mortgagees conveyed away the estate without transferring the debt and without any

(1) 19 Ch. D. 214.
(2) Law Rep. 18 Eq. 556.
(3) 5 Hare, 272.
(4) 3 Drew. 3.

C. A. 1890 TAYLOR v. RUSSELL.

consideration. By so doing they committed a breach of trust as against the Plaintiffs, who were entitled to the equity of redemption. The Defendants cannot take advantage of this breach of trust which they induced the first mortgagees to commit.

[With respect to the question of negligence they cited *Cory* v. *Eyre* (1); *Dixon* v. *Muckleston* (2).]

J. Scott Fox, in reply.

1890. Nov. 20. The judgment of the Court (Sir *J. Hannen*, and *Bowen* and *Fry*, L.JJ.), was delivered, as follows, by

FRY, L.J.:—

The Plaintiffs in this action have obtained from Lord Justice *Kay*, when a justice of the High Court, a declaration that a mortgage security vested in them is entitled to priority over a mortgage vested in the Defendants. The Defendants have appealed. The questions for decision arise from the conjoint operation of an honest blunder and a fraud.

The circumstances of the case are shortly as follows: In the year 1862 certain land was, under the will of one *Robert Surtees*, limited to legal uses in strict settlement, under which *Robert L. Surtees* and *Henry Edward Surtees* were successively tenants for life. The testator had conferred on his trustees, *Maude* and *Wilkinson*, powers of sale and mortgaging, and of revoking and appointing uses to carry any sale or mortgage into effect. In 1862 Messrs. *Maude* and *Wilkinson* mortgaged certain lands to Sir *Francis D. Legard* to secure £9000. These lands included the property in question, together with much other property; and by some accident the deeds of the property in question remained in the custody of the *Surtees* trustees.

It appears that the fact that the land in question was included in this mortgage was entirely forgotten, and accordingly, by a deed of the 30th of January, 1883, *Wilkinson*, the surviving trustee of the *Surtees* will, together with *Henry Edward Surtees*, the tenant for life, conveyed the land in question to one *Toward* for valuable consideration, and *Wilkinson* covenanted in the usual terms

(1) 1 D. J. & S. 149. (2) Law Rep. 8 Ch. 155.

that he had done no act whereby the land was encumbered except by a lease mentioned in the conveyance. On completion *Toward* received the title-deeds of the land in question. *Toward*, having procured this conveyance, set himself to concoct a forged deed purporting to convey the same land to himself, in order to enable him to effect two separate mortgages of it, one under the genuine and one under the forged title; accordingly he produced a document which bore date the 3rd of November, 1882, and purported to be made between trustees of the will of one *Samuel Smithson*, Mr. *Smithson* the tenant for life under that will, and *Toward* himself. It recited a title under the will of *Smithson*, and it purported to convey the land in question for valuable consideration. The parties named in this forgery were real persons. There had been a *Samuel Smithson*, a testator who was seized of an estate near the land in question. The trustees named were the trustees of that will, and *Smithson* was the tenant for life under it. Armed with this forged instrument, *Toward* obtained £2500 from the Plaintiffs on the security of a mortgage of the 15th of February, 1883, by which *Toward* deducing title from *Smithson's* trustees, conveyed the land to the Plaintiffs; at the same time he deposited with the Plaintiffs the forged deed of the 3rd of November, 1882. In this way the Plaintiffs became possessed of a good equitable estate under *Toward*. Subsequently *Toward* borrowed money from a bank on a mortgage of the same land, deducing the true title. The subsisting incumbrance was, on the 20th of October, 1887, paid off by the Defendants; and *Toward* thereupon executed to them a mortgage deducing the true title, and deposited with them the genuine title-deed of the 30th of January, 1883.

It is obvious that down to this point the titles of both Plaintiffs and Defendants are equitable only. But in the year 1888 *Toward* absconded, and his misdeeds coming to light, the Defendants applied to the trustees of Sir *Francis Legard's* will, in whom was the vested mortgage of 1862, to convey to them the legal estate in the land in question, and an arrangement was come to between the *Legard* trustees, *Wilkinson* and *Jennings*, who were then the *Surtees* trustees, and the Defendants to the effect that the *Legard* trustees, who were satisfied of the sufficiency of

C. A. 1890 TAYLOR v. RUSSELL.

the other mortgaged property to satisfy their claim, should convey the legal estate in the land in question to the *Surtees* trustees upon the express condition that the *Surtees* trustees would immediately thereafter convey the same to the Defendants. This arrangement was carried into effect by two deeds, the first dated the 21st of November, 1888, by which the *Legard* trustees conveyed the land in question unto and to the use of the *Surtees* trustees in fee simple to the uses upon the trusts and subject to the powers of the *Surtees* will, the tenant for life under the *Surtees* will being a party to this deed; the second, dated the 26th of November, 1888, by which the *Surtees* trustees conveyed the land to the Defendants, and they thus at last acquired the legal estate which had hitherto been outstanding. The Defendants, being thus the legal owners of the property, are entitled to priority over the Plaintiffs, who are merely equitable owners, unless the Plaintiffs have some equity to deprive the Defendants of that benefit.

It has not been argued that the Defendants have assisted in, or connived at, any fraud, or constituted *Toward* their agent, so as to become responsible for his fraud; but it is argued that the Defendants procured the conveyance of the legal estate under circumstances which preclude them from claiming the benefit of it in a Court of Equity. In considering this question we must bear in mind that the Defendants seek no assistance from equity; they take their stand on their legal title, and the Plaintiffs must fail unless they shew an equity to deprive the Defendants of their legal right.

It has been argued, in the first place, that the Plaintiffs, having an equitable estate prior in time to that of the Defendants, had a right, and a better right than the Defendants, to call on *Wilkinson* to assign to them the legal estate; that on the 21st of November, 1888, this right attached; and that the Defendants, taking the legal estate with knowledge of this equitable claim of the Plaintiffs, cannot set it up against them. It is not necessary to consider whether, if *Wilkinson* and his co-trustee had obtained the legal estate free from any trust or condition, this contention ought to prevail; but they did not so obtain it; it came to them from the diligence and exertions of the Defendants, and it came

to them clothed with a trust or subject to a condition to convey it to the Defendants. Even if they ought never to have so taken the legal estate (which we see no reason to affirm), they could not, when they had taken it, refuse to perform the condition on which they took it without a gross violation of confidence and breach of good faith, of which no equity could, in our judgment, require them to be guilty. Furthermore, it is plain that notice of the existence of an equity prior in date to that of the person who obtains the legal estate does not prevent that person from claiming its benefit when such notice is received not before, but after, the creation of the equitable estate, of him who gets in the legal estate. "There is nothing more familiar," said Lord *Selborne*, in expressing the opinion of the Judicial Committee of the Privy Council in the case of *Blackwood* v. *London Chartered Bank of Australia* (1), "than the doctrine of equity that a man, who has *bonâ fide* paid money without notice of any other title, though at the time of the payment he, as purchaser, gets nothing but an equitable title, may afterwards get in a legal title, if he can, and may hold it; though during the interval between the payment and the getting in the legal title he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself." "In every case," said Lord *Hatherley*, in *Bates* v. *Johnson* (2), "down to *Peacock* v. *Burt* (3), which is probably one of the most striking of the kind, it has been held, that, when once a subsequent incumbrancer, who, by advancing his money without notice of prior mesne incumbrances, stands in an equally good position with them in every respect, except as regards time, gets in the legal estate, he has a right to avail himself of that legal estate until the whole of his incumbrance is discharged."

An argument substantially the same as that which we have already discussed was presented by the Plaintiffs' counsel in a slightly different form. *Wilkinson*, by the deed of the 30th of January, 1883, covenanted with *Toward* and his assigns that he had not incumbered; in fact, he had incumbered, and it is urged that when he got in that incumbrance, and had the legal estate

(1) Law Rep. 5 P. C. 111. (2) Joh. 314.
(3) 4 L. J. (N.S.) (Ch.) 33.

C. A. 1890 TAYLOR v. RUSSELL.

vested in him, he was bound to use it to make good, in favour of the Plaintiffs as assigns of *Toward*, the erroneous representation contained in his covenant. We cannot accede to this argument. *Wilkinson* may or may not be liable to damages on his covenant; but he could never be called on to make it good by conveying to the Plaintiffs an estate which he had consented to take on an express trust for the Defendants; and, furthermore, the Defendants, as well as the Plaintiffs, were assigns of *Toward*, and seem to have had an equal equity with the Plaintiffs to require *Wilkinson* to make good his statement.

It was, in the next place, urged on us that the *Surtees* trustees, by taking a conveyance of the legal estate to themselves and by executing the deed of the 26th of November, were committing a breach of trust and acting in excess of their power to mortgage. The terms of this power are not before us, nor the position of the *Surtees* family or the interests of its members under the will; but it is before us that the transactions complained of were carried into effect by deeds, to one of which the tenant for life was a party. But, assuming that these acts were such as those who claim under the will of Mr. *Surtees* could complain of, it appears to us that they afford no assistance to the Plaintiffs. A man may come to equity and successfully say to a defendant, "You have obtained the legal estate in breach of an equity which I possess or of a trust under which I claim, and you shall not set it up accordingly"; but a plaintiff cannot rely on some breach of trust towards third persons who assert no title to the estate and take no part in the litigation. The plaintiff, to deprive the defendant of the benefit of the legal estate, must rely on an equity of his own, not on that of a stranger.

Some language of the late Master of the Rolls in *Harpham* v. *Shacklock* (1) was pressed upon us as inconsistent with this view. He there said that, "Nothing is better settled than that you cannot make use of the doctrine of *tabula in naufragio* by getting in a legal estate from a bare trustee after you have received notice of a prior equitable claim." The doctrine to which the learned Judge referred we understand to have been that more fully explained by Lord *Eldon* in *Maundrell* v. *Maundrell* (2), to

(1) 19 Ch. D. 207, 214. (2) 10 Ves. 246, 259, 260.

the effect that where there is a term in gross the expressed object of which has been satisfied, the term is, according to the doctrine of equity, held upon trust for the successive equitable interests according to their priorities. It follows that if a subsequent equitable owner gets in the term with notice of the prior equity he gets it in subject to the equity of the prior equitable owner, and, consequently, is restrained from setting it up against such owner by reason of an equity vested not in a third person, but in that prior equitable owner himself.

The case of *Harpham* v. *Shacklock* (1), in which the late Master of the Rolls used the language referred to, is no exception to this principle. In that case the defendants got in the legal estate and set it up against the plaintiff who had an equity to prevent their so doing; for the legal estate was in one *Peck*, who had assigned his security to the defendant *Shacklock*, and, not having surrendered the legal estate, held it as trustee for *Shacklock*, and *Shacklock* having received the plaintiff's money to pay off *Peck* was a trustee for the plaintiff; so that the plaintiff and not a stranger had an equity to prevent the defendant setting up the legal estate. "If there is a mortgage of the inheritance," said Lord *Eldon* in *Maundrell* v. *Maundrell* (2), "and a prior mortgagee, of whose title the other has no notice, if the subsequent mortgagee can get in a term, satisfied, or, according to the later cases, not satisfied, by an assignment to trustees for him, he can protect himself against the prior incumbrancer; unless there are circumstances, that give that incumbrancer a better right to call for an assignment."

On authority, therefore, as well as principle, we are of opinion that a trust or equity to affect the conscience of him who has got in the legal estate must be a trust or equity not in favour of some third person who may have no care or desire to insist upon it, but a trust or equity in favour of the person against whom the legal estate is set up. The Defendants were perfectly innocent holders of the equitable estate; they clothed themselves with the legal estate without notice, in our opinion, of any equity in the Plaintiffs to prevent them so doing, and we see,

(1) 19 Ch. D. 207, 214. (2) 10 Ves. 270.

C. A. 1890 TAYLOR v. RUSSELL.

therefore, no reason to deprive them of the benefit they have acquired.

Taking this view of the case, it becomes needless for us to enter upon a discussion as to any question of negligence, or as to the relative equities of the Plaintiffs and Defendants. We allow the appeal, and dismiss the Plaintiffs' action with costs as against the appealing Defendants.

Solicitors: *C. & S. Harrison & Co.; Iliffe, Henley, & Sweet.*

M. W.

KAY, J.
1890
Oct. 27, 28; Nov. 8.

HALIFAX JOINT STOCK BANKING COMPANY *v.* GLEDHILL.

[1888 H. 168.]

Settlement—Fraud on Creditors—13 *Eliz. c.* 5, *ss.* 1, 5 [*Revised Ed. Statutes, vol. i., pp.* 628, 629]—*Purchaser for Value without Notice—Purchase of Interest derived under Settlement.*

Sect. 5 of 13 Eliz. c. 5, excepting from the operation of that Act (which avoids assurances made in fraud of creditors) interests lawfully conveyed upon good consideration and *bonâ fide* to persons having no notice of any fraud, includes a purchaser of any interest under the deed impeached, whether that interest be legal or equitable, and prevents the deed being void against him.

By a settlement which was fraudulent against creditors under 13 Eliz. c. 5, a reversionary life interest was reserved to the settlor. He subsequently charged such interest by way of equitable mortgage in favour of a mortgagee who advanced his money without notice that the settlement was fraudulent. In an action by creditors of the settlor to have the settlement declared void:—

Held, that the interest of the equitable mortgagee was protected by sect. 5, and that the settlement must be declared void as against the Plaintiffs and other creditors of the settlor, except as to his reversionary life interest thereunder.

THIS was an action by judgment creditors of the Defendant, *John Gledhill*, to have it declared that a settlement of the 27th of October, 1887, was fraudulent and void under 13 Eliz. c. 5.

On the 25th of June, 1885, *John Gledhill* gave to the Plaintiffs a guarantee to secure the banking account of his son *Thomas* to the amount of £3500.

Thomas Gledhill, who was living with his father, but carrying on business separately, became embarrassed, and on the 26th of October, 1887, he issued circulars calling a meeting of his creditors for the 31st of October.

On the 27th of October, 1887, the settlement in question was executed by *John Gledhill*, and thereby he conveyed and assigned certain hereditaments at *Spring Gardens Lane, Keighley*, and a policy upon his life for £250, to his son, the Defendant, *Samuel Gledhill*, upon trust for the benefit of his (*John Gledhill's*) wife, the Defendant *Susannah Gledhill*, for her life for her separate use,

KAY, J.
1890
HALIFAX JOINT STOCK BANKING COMPANY v. GLEDHILL.

then for himself for life, and subject thereto for all his present and future children.

On the 8th of November a composition was arranged with the creditors of *Thomas Gledhill*, and the Defendant *William Sellers*, at *Thomas Gledhill's* request, became surety for the payment of the last instalment, amounting to £2000. For this purpose he gave a cheque for that sum, dated the 15th of November, 1887, to *Richard Moore*, on behalf of the creditors; and *John Gledhill*, on the same day, gave to *Sellers* security for the repayment of the £2000, or such part thereof as *Sellers* might be called upon to pay, by depositing with him the deed of settlement of the 27th of October, 1887, and the prior title-deeds of the *Spring Gardens* property, and also the policy of life assurance, and signing a memorandum of deposit whereby *Sellers* was empowered to realize if the £2000 was not paid to him when called upon to meet his draft. This memorandum was also signed by *Thomas Gledhill*, and he thereby agreed to give as further security for the £2000 the residue of his estate, after he had paid his creditors 6*s.* 6*d.* in the pound, and not to purchase any wool until the whole of his liabilities had been met.

Moore negotiated *Sellers'* cheque, which *Sellers* was compelled to pay to the holder, although the composition scheme failed, and *Thomas Gledhill* was adjudicated bankrupt. *Sellers* brought an action against *Moore* for improperly parting with the cheque, and recovered judgment; but a new trial being ordered, it was compromised, *Moore* paying £1297 6*s.* 8*d.*

In February, 1888, the Plaintiffs recovered judgment on their guarantee against *John Gledhill*; and in March, 1888, an order was made, on their application, appointing a receiver of the rents and profits of the *Spring Gardens* property.

It was proved that, when the settlement was executed, *John Gledhill* knew of the embarrassments of his son, and that he executed the settlement for the purpose of defeating the guarantee, so far as the property comprised in the deed was concerned. There was also evidence tending to shew that *John Gledhill* had not, at the time when the settlement was executed, property sufficient to provide for all his liabilities.

The Defendants, *Samuel Gledhill* and *Susannah Gledhill*, at the

bar, by their counsel, disclaimed any interest in the subject-matter of the action.

The Defendant *Sellers* claimed to be entitled to the balance due to him, and to be protected as to the interests which he acquired under the settlement as a purchaser for value without notice, under sect. 5 of 13 Eliz. c. 5. In his statement of defence he alleged that he did not know that the settlement was fraudulent and void, and in his evidence he said he did not know of *John Gledhill's* guarantee to the Plaintiffs. It was contended on his behalf that his security extended not only to the reversionary life interest of *John Gledhill*, but also to the interests of his wife and sons. *John Gledhill* deposed that he made the deposit with the consent of his wife and son *Samuel*; but there was no evidence to shew that they assented to their interests being bound thereby.

By 13 Eliz. c. 5, s. 1, revised edition (commonly printed as s. 2), it is in effect provided that every conveyance "devised and contrived of malice, fraud, covin, collusion, or guile," to the end, purpose, and intent, to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, &c., shall be from thenceforth deemed and taken (only as against that person or persons, his or their heirs, successors, administrators, and assigns, whose actions, suits, debts, &c., are disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate, and of none effect.

By 13 Eliz. c. 5, s. 5, revised edition (commonly printed as sect. 6) "this Act, or anything therein contained, shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods, or chattels, had, made, conveyed, or assured, or hereafter to be had, made, conveyed, or assured, which estate or interest is or shall be upon good consideration and *bonâ fide* lawfully conveyed or assured to any person or persons, or bodies politick or corporate, not having, at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud, or collusion, as is aforesaid."

Marten, Q.C., and *Eyre*, for the Plaintiffs:—

Upon the evidence it is clear that the settlement of the 27th

KAY, J.
1890
HALIFAX JOINT STOCK BANKING COMPANY v. GLEDHILL.

of October, 1887, is void as against the creditors of *John Gledhill*, under 13 Eliz. c. 5. The Defendant *Sellers*, as assign of *John Gledhill*, can have no better title than his assignor, unless he can bring himself within the protection of sect. 5 of the Act (commonly printed as sect. 6). He is not a purchaser for value without notice within the protection of that section, which relates only to purchasers claiming directly under the deed which is impeached, and not to persons who subsequently purchase an interest derived under it. In the act of executing the settlement *John Gledhill* committed a fraud on his creditors, and no one can take a security under an instrument which is a fraudulent act.

J. G. Butcher, for the Defendant *John Gledhill*.

Cartmell, for the Defendants *Susannah* and *Samuel Gledhill*.

Haldane, Q.C., and *Hood*, for the Defendant *Sellers*:—

As a purchaser for value without notice, *Sellers* is protected. The right of the creditors to have the deed declared void is, no doubt, *primâ facie* a legal right; but sect. 5, protecting interests acquired *bonâ fide*, puts the right on the same footing as if it were equitable: *George* v. *Milbanke* (1), following *Prodgers* v. *Langham* (2). The principle of those cases was that subsequent *bonâ fide* transactions imported a consideration which related back and made the voluntary instrument which was impeached good *ab initio*. In *Doe* v. *Martyr* (3) the title of a purchaser for valuable consideration prevailed over a prior voluntary settlement of which he had no notice, though he purchased of one who had obtained a conveyance by fraud, of which fraud he, the purchaser, was ignorant; and *In re Barker's Estate* (4), which was decided under 27 Eliz. c. 4, is an authority to shew that consideration may be imported by the operation of a subsequent transaction. The effect of the entire enactment of 13 Eliz. is that the settlement is not void, but only voidable.

[KAY, J.:—The statute says "void."]

In early times there was a great deal of controversy about the

(1) 9 Ves. 190.
(2) Sid. 133.
(3) 1 B. & P. (N.R.) 332.
(4) 44 L. J. (Ch.) 487.

meaning of the word "voidable." But if the settlement was void, then the legal fee simple remained in *John Gledhill*; and as the creditors have no specific lien on the settled property, the title of *Sellers*, who has acquired such a lien, must prevail over theirs.

Marten, in reply:—

Sect. 5 does not in any way cut down the effect of sect. 1. The fraudulent deed is void as against the creditors delayed as soon as it is executed. *George* v. *Milbanke* (1) was treated by Lord *Eldon* as a case in which there was a conflict between two equities (which is not the case here), and was not decided in any way under the statute of 13 Eliz. *Doe* v. *Martyr* (2) also has no reference to the statute, but was a case in which a deed was set aside on a ground of personal equity.

[KAY, J., referred to *Daubeny* v. *Cockburn* (3).]

George v. *Milbanke* (4) was discussed in *Payne* v. *Mortimer* (5), together with the case of *East India Company* v. *Shepherd*, reported in a note. (6) The judgment of Lord Justice *Turner* is explicit, that if a settlement is invalid under the statute the payment of money by a volunteer cannot render it valid. *Prodgers* v. *Langham* (7) was decided under 27 Eliz. c. 4, and was the case of a voidable deed, and *In re Barker's Estate* (8) was under the same statute, and does not carry the matter any further.

[He referred also to *Freeman* v. *Pope* (9) and *Spirett* v. *Willows* (10).]

Nov. 8. KAY, J. (after referring to the facts of the case, and stating that he had come to the conclusion, after a careful consideration of the evidence, that the settlement of the 27th of October, 1887, was void under the statute of 13 Eliz. as against the general creditors of *John Gledhill*, continued as follows:—)

But then *Sellers* claims to be protected as to the interests which

(1) 9 Ves. 190, 193.
(2) 1 B. & P. (N.R.) 332.
(3) 1 Mer. 626, 643.
(4) 9 Ves. 193.
(5) 4 De G. & J. 447.
(6) 4 De G. & J. 455, n.
(7) Sid. 133.
(8) 44 L. J. (Ch.) 487.
(9) Law Rep. 9 Eq. 206; 5 Ch. 538.
(10) 5 Giff. 49.

KAY, J.
1890
HALIFAX JOINT STOCK BANKING COMPANY v. GLEDHILL.

he acquired under the settlement, as a purchaser for value without notice under sect. 5 of 13 Eliz. c. 5 (1).

What interest did he so take? The deposit and memorandum signed by *John* and *Thomas Gledhill* could only give him such interest as they had—that is, a reversionary life interest after the death of *Susannah*, the wife of *John*, and the share of *Thomas* as one of *John's* children. But *Thomas* does not purport to charge his interest under the settlement. He signed the memorandum evidently because he thereby agreed to give security upon the residue of his estate, after he had paid the composition, and not to buy more wool. *Susannah* and *Samuel* did not sign.

I am unable to treat this deposit as giving *Sellers* any security except upon the reversionary life interest of *John Gledhill*, which is probably worthless.

The question of law which has been raised is important.

Sect. 5 of 13 Eliz. c. 5 has generally been treated as applying to a purchase by the settlement itself; but there is some authority for treating it as applicable to the purchase for value of an interest under a voluntary deed which has been subsequently assigned.

As far as I can discover there is no direct decision upon this point. The subject is carefully considered in *May's* treatise on the statute (2). It is there stated that, although there is authority for saying that a subsequent valuable consideration will support a deed under 27 Eliz. c. 4, there is no express decision that this would be the case under 13 Eliz. c. 5. The rights of creditors under that statute accrue immediately upon the execution of the settlement impeached. The learned author proceeds to argue that the deed, being good against the grantor and only void against creditors, is practically not void, but voidable at their suit, and that consequently a purchaser for value of an interest under the deed can successfully resist any attempt to avoid it.

It seems to me impossible to say that the right of creditors under the statute of 13 Eliz. c. 5 is an equity, if that is the learned author's meaning. A court of equity does not avoid the deed in a suit by such creditors, but merely declares, if it is proved fraudulent, that it is void against them by the statute.

(1) Commonly printed as sect. 6. (2) 2nd Ed. p. 323.

The real question is whether a subsequent purchaser for value of an interest under the settlement without notice has his purchase protected by sect. 5. If he has, it does not matter whether it was a legal or merely an equitable interest. If he has not, then, as the creditors' rights are under a positive enactment that the deed is void against them, their claim is not equitable, but legal.

It seems strange that there should be no direct decision. On the other hand, I have not been able to find a case in which creditors have prevailed against such a purchaser. In *Prodgers* v. *Langham* (1), a case treated as authoritative by Lord *Eldon* in *George* v. *Milbanke* (2), and called by Lord *Kenyon* in *Parr* v. *Eliason* (3) "a very leading authority," it is stated that if there be a fraudulent feoffment, and the feoffee enfeof another for valuable consideration without notice of the fraud, his title shall prevail against a subsequent purchaser for value from the first feoffor, notwithstanding the 27 Eliz. c. 4. It is not expressly stated in the report that this is by reason of sect. 3 of that statute, which is similar to sect. 5 of the 13 Eliz. c. 5, nor does Lord *Eldon* or Lord *Kenyon* give that as the reason for the decision. Lord *Eldon* says this (4): "The reason as stated, is this; that, though a voluntary feoffment is bad as between the creditor and the feoffee, yet it is good as between the feoffor and feoffee; and therefore the latter, if prior, shall hold against the subsequent feoffee of the feoffor. The consequence is, that the feoffment of the voluntary feoffee is good against creditors."

This can hardly be a correct report of what Lord *Eldon* said. The voluntary feoffee could not hold against a subsequent feoffee for value from the original feoffor, by reason of the statute 27 Eliz. c. 4. The feoffment of a voluntary feoffee though for value, could not make good the voluntary feoffment to him, if void under 13 Eliz. c. 5, unless the position of the feoffee is saved by sect. 5 of that statute. In that case, the feoffment of the voluntary feoffee is good against creditors of the original feoffor by positive enactment.

The actual decision in *Prodgers* v. *Langham* was that a lease

(1) Sid. 133.
(2) 9 Ves. 190.
(3) 1 East, 92, 95.
(4) 9 Ves. 195.

KAY, J.
1890
HALIFAX JOINT STOCK BANKING COMPANY v. GLEDHILL.

for the benefit of a daughter, if she married with her father's consent, being voluntary, would be void against a subsequent purchaser for value by virtue of 27 Eliz. c. 4, but that, although so void, it might be made effectual against such purchaser by a subsequent marriage of the daughter upon the faith of it.

This seems to have proceeded upon the ground that the subsequent consideration of the marriage related back as though the settlement had been made upon the marriage.

The case of *George* v. *Milbanke* (1) was a contest between the creditors of the appointor, who in his lifetime had exercised a general power of appointment over a fund in favour of a volunteer, and a purchaser after his death from the volunteer of £500 part of the appointed fund. By the equitable rule the exercise of the power made the appointed fund assets to pay debts of the appointor. Lord *Eldon*, after much consideration, held that the purchaser of the £500 had the better equity. There was no question under either 13 Eliz. c. 5 or 27 Eliz. c. 4, and Lord *Eldon*, treating the case in *Siderfin* as a binding authority, and saying that there had been frequent decisions according to that case, points out that the purchaser there had the legal estate, which looks as though he regarded it as a decision under the equitable doctrine that the Court will not take the legal estate away from an innocent purchaser.

In *Payne* v. *Mortimer* (2) the question arose whether an assign for value of a voluntary bond was in a better position, as regarded the other creditors of the deceased obligor, than the obligee, who, by the equitable rule, would have ranked after them, and it was held that he was and might take *pari passu* with the other specialty creditors, as though the bond had originally been for value. In that case *Turner*, L.J., in his judgment (3) says this: "It was not denied on the part of the general creditors, on whose behalf the case was argued, that, in the absence of fraud, a voluntary assignment of personal estate is made good against creditors by a subsequent assignment of it for valuable consideration; but it was said that this was so only by the operation of the *Statute of Elizabeth*, preventing the author of the voluntary instrument

(1) 9 Ves. 190. (2) 4 De G. & J. 447.
(3) 4 De G. & J. 452.

from disputing the right of the alienee for value, and that the assignment for value could not change the nature of the original debt, and convert an obligation which was voluntary in its inception into an obligation for valuable consideration. Lord *Eldon*, however, in *George* v. *Milbanke* (1) did not put the case upon the *Statute of Elizabeth*. He had regard, no doubt, and indeed the report shews, although but obscurely, that he had regard, to the proviso in the statute which protects alienees for value only in the case of absence of notice, and he puts the case upon the ground of the assignee for value having a better equity than the general creditors of the settlor."

This seems to be a clear recognition by *Turner*, L.J., that sect. 5 of 13 Eliz. c. 5, does protect a purchaser for value without notice of an interest derived under a settlement which that statute would make void against creditors as to other persons claiming under it.

This is the conclusion at which the author of the treatise I have referred to arrives.

I think that it is right to hold that sect. 5 does include a purchaser for value, without notice, of any interest under the deed impeached, whether that interest be legal or equitable, and prevents the deed being void against him.

No claim has been made on *Sellers'* behalf under 27 Eliz. c. 4, and I think none could be supported. In the first place, the settlement included a policy of assurance, to which, being personal property, that statute would not apply. It could only affect the real estate. It cannot be supposed that he was to take by the deposit a different interest in these two subjects. The memorandum of deposit giving power to realize looks rather as though the intention was to do away with the settlement altogether—an intention which, if ineffectual as to the policy, might prevail as to the real estate under 27 Eliz. c. 4. *Sellers*, however, says in his evidence that he had been informed of the settlement, and, as I have pointed out, he in his defence denies that he considered it void. I think, as he took a deposit of it from the trustee and settlor, the true result is that he obtained and only intended to have such interest as the settlor could give him if

(1) 9 Ves. 190.

KAY, J.
1890
HALIFAX JOINT STOCK BANKING COMPANY v. GLEDHILL.

the settlement were valid. The settlor had at the time other property on which he could have given him a security; but he did not offer to do so.

Upon the whole, I think the proper order will be to declare the settlement void as against the bank and other creditors of *John Gledhill*, except as to his reversionary life estate thereunder which has been mortgaged to *Sellers*. Let the property included in the settlement be realized. Value *John Gledhill's* reversionary life estate. Pay the value, if any, to *Sellers*, and his costs of this action; pay the rest of the fund to the bank, and the other creditors of *John Gledhill*, if any, *pari passu*.

Susannah and *Samuel Gledhill* have disclaimed. They will have no costs; but the costs of the bank must be paid out of the proceeds after satisfying the claim of *Sellers*, as I have mentioned.

Solicitors: *Jaques & Co.*, agents for *Watson, Dickons, & Watson, Bradford; Ullithorne, Currey, & Villiers*, agents for *W. & G. Burr & Co., Keighley; Salaman*, agent for *Robinson & Robinson, Keighley*.

C. C. M. D.

In re MEEUS' APPLICATION.

CHITTY, J.

1890

Nov. 4, 5, 6, 11, 12.

[1888 M. 3943.]

Trade-mark—Old Mark—Foreign Manufacturer—User—Common Particular—Disclaimer—Amendment of Application—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 69, 71, 72, 74, *sub-s.* 2.

The Court has no power judicially to amend an application under sect. 69 of the *Patents, Designs, and Trade Marks Act,* 1883, by directing the Comptroller to proceed with the registration of the essential part of a proposed trade-mark.

Orr-Ewing v. *Registrar of Trade Marks* (1) stated and explained.

An applicant seeking to register as an old mark, a distinctive device and combination of words, must shew that the whole combination, just as he proposes to register it, has been used in its entirety prior to the 13th of August, 1875.

In re J. B. Palmer's Trade Mark (2) discussed and applied.

An originally defective or wrongful application cannot be corrected by subsequent disclaimer; the direction in the *Patents, Designs, and Trade Marks Act,* 1883, s. 74, sub-s. 2, as to disclaiming the right to exclusive use of common particulars in the application, is express, and must be strictly complied with.

Semble, the importation of goods, marked with a distinctive brand or label, for purposes of transhipment only, is not sufficient user to acquire a title in such brand or label.

Adjourned Summons.

This was an application, under rule 29 of the Trade Mark Rules, 1883, on behalf of *Louis Meeus,* that the Comptroller-General might be directed to proceed with the registration of the Applicants' mark, notwithstanding the opposition of Messrs. *Blankenheym & Nolet.* The Applicants carried on the business of distillers of "*Geneva,*" at *Antwerp,* and proposed to register as an old mark, a label for bottles consisting of a key ornamented with ears of corn, the signature "*Louis Meeus*" across it, with the word "*Antwerp*" underneath, the whole being enclosed in two concentric circles, with the printed words "*Geneva 'Key' Brand, Louis Meeus*" round the inner circle. The Applicants alleged that ever since 1874 they had imported into the *United*

(1) 4 App. Cas. 479.

(2) 24 Ch. D. 504.

CHITTY, J. 1890 *In re* MEEUS' APPLICATION.

Kingdom, for the purpose of transhipment to the Colonies and abroad, large quantities of their Geneva in cases and bottles, marked and labelled with this trade-mark, and that their goods had been ordered and purchased by merchants and agents in the United Kingdom for exportation, under the name of "*Key*" *Brand Geneva*. The application was opposed by Messrs. *Blankenheym & Nolet*, distillers of *Geneva*, at *Rotterdam*, who alleged, that they also had exported Geneva into the *United Kingdom* for more than fifty years under the title of "*Key*" or "*Key Brand*" *Geneva*, and that they had since 1855 continuously used a key, as the essential part of their mark for Geneva. Messrs. *Blankenheym & Nolet* had applied to register some of their marks as old marks, and this application was still pending before the Comptroller. It was admitted at the Bar, that the Applicants desired to register, merely to obtain a concurrent right to the user of their mark with Messrs. *Blankenheym & Nolet*, and that the chief object of their application was, to protect their transhipment trade; but it was also admitted that if their application were successful, they would be registered for all the purposes of the Act, and entitled to the use and protection of the registered mark, not only for their transhipment trade, but also for any retail trade they might think fit to carry on in the *United Kingdom*. A number of affidavits in support of, and in opposition to, the application had been filed, upon which most of the deponents were cross-examined in Court; but no branding-irons, old labels, or tickets, or any of the usual documentary evidence was adduced in support of the Applicants' case, that the mark now before the Comptroller, was similar in all respects to that used upon their goods, prior to the 13th of August, 1875; the Applicants' witnesses however did prove, in the opinion of the Court, that a key, sometimes with, and sometimes without, the corn and the signature, and the words "*Louis Meeus, Antwerp*," or "*Anvers*," were branded on the cases sent over to the *United Kingdom* for transhipment prior to August, 1875, and subsequently; but the Applicants failed, in the opinion of his Lordship, to prove that the cases of spirit, with the brand of the key outside, were ever taken out of the ship's hold on their arrival in the *United Kingdom*, and the conclusion he

arrived at on the evidence, on this part of the case as to user, in *England*, was, that the ships were touching only at the various ports named, and that the goods, without the cases ever being seen, were passed on in the same ships to their destination abroad.

Romer, Q.C., and *Chadwyck Healey*, for the Applicants :—

We are entitled to register this mark, as an old mark, concurrently with the mark of Messrs. *Blankenheym & Nolet*. We send our goods to a different market, and, consequently, our goods do not compete with those of our opponents, and our mark is, therefore, not calculated to deceive any one. Even if the opponents were on the register they would have to prove absolute fraud to oppose this application successfully: *In re Heaton's Trade-mark* (1). Fraud is not suggested against us, and there is no evidence of any one having been deceived.

[CHITTY, J., referred to *Cope* v. *Evans* (2)].

The importation of the goods, marked with this trade-mark, for transhipment, is user sufficient to acquire a title. Such user has been proved; it is not necessary to prove knowledge of this user against any particular trader, so long as the user was fair and in the regular course of business. The character of the user in this case is, that before 1875 the goods came to an English port, at the instance of English buyers, marked with this mark. Assuming that we have not proved that the whole of this mark has been used in its entirety prior to August, 1875, still, the Comptroller could be directed, as in *Orr-Ewing* v. *Registrar of Trade Marks* (3), to register the distinctive device of the key and the corn, which is the essential part of our label, just as in *Orr-Ewing* v. *Registrar of Trade Marks* (4) the distinctive devices of animals were directed to be registered. The Act of 1883 contemplates a distinction between essential and non-essential features in a trade-mark. So that *In re J. B. Palmer's Trade-mark* (5) does not affect this case.

(1) 27 Ch. D. 570.
(2) Law Rep. 18 Eq. 138.
(3) 4 App. Cas. 479.
(4) Ibid. 503.
(5) 24 Ch. D. 504.

CHITTY, J.
1890
In re MEEUS' APPLICATION.

Byrne, Q.C., and *A. J. Walter*, for Messrs. *Blankenheym & Nolet* :—

Orr-Ewing v. *Registrar of Trade Marks* (1) is not an authority that the Court can, in a case like this, direct the registration of the essential part of the mark; that case only removed the initial difficulty raised by the committee of experts. The words "*Geneva Key Brand*," even if special and distinctive, have not been used alone as a trade-mark before August, 1875: *Perry Davis & Son* v. *Harbord* (2). The Court has no jurisdiction to direct the Comptroller to register a mark totally different from the one for which application was made.

The Applicants fail to prove user of this mark or of any part of it in *England*; importation for the purpose of transhipment to the Colonies or abroad is not user: *Re Munch's Application* (3), *Jackson & Co.* v. *Napper* (4), in which case the question of this kind of user was raised and decided by Mr. Justice *Stirling* (5). Our mark has been used on Hollands and Geneva long before the Applicants used theirs, and to direct registration of the Applicants' mark now would be calculated to deceive the public: *In re Australian Wine Importers* (6); *In re Rivière's Trade-mark* (7); *Eno* v. *Dunn* (8).

[CHITTY, J., referred to *In re Arbenz' Application* (9).]

The Applicants have failed to shew user, and they have failed to prove that the whole of their mark has been used prior to August, 1875, and the application should be dismissed.

Chadwyck Healey, in reply :—

In re J. B. Palmer's Trade-mark (10) and *In re Leonard & Ellis's Trade-mark* (11) all turned on combinations of words. The essential part of our mark is a "key," and there is evidence of its having been used before 1875; it has become known as the emblem of our goods; the rest of the mark are simple additions,

(1) 4 App. Cas. 479.
(2) 15 App. Cas. 316.
(3) 50 L. T. (N.S.) 12.
(4) 35 Ch. D. 162.
(5) 4 Rep. Pat. Cas. at p. 59.
(6) 41 Ch. D. 278.
(7) 26 Ch. D. 48.
(8) 15 App. Cas. 252.
(9) 35 Ch. D. 248.
(10) 24 Ch. D. 504.
(11) 26 Ch. D. 288.

which do not constitute a trade-mark, though explaining the nature of the goods. The user we have proved is sufficient: *In re Wragg's Trade-mark* (1). We have had our goods on the English market as a "vendible article": *McAndrew* v. *Bassett* (2); and even if we have not invariably used the whole of the mark in its present form, that does not deprive us of our right to register: *Mouson & Co.* v. *Boehm* (3).

[*In re Hudson's Trade-marks* (4), and *Jelly, Son, & Jones's Application* (5), were mentioned.]

We can disclaim the immaterial words now, and thus correct our application: *Sebastian* on Trade-marks (6). Subsequent disclaimers have been directed in *In re Hayward's Trade-marks* (7); *Humphries* v. *Taylor Drug Company* (8), and in *Burland* v. *Broxburn Oil Company* (9), shewing that the Court can and does correct an originally defective or wrongful application. I therefore ask the Court to direct the Comptroller to register the "key" and the signature with a disclaimer as to the words "*Geneva Key Brand.*"

[*In re Goodall's Trade-mark* (10) was also mentioned.]

CHITTY, J. (after shortly stating the facts, and the nature of the application, continued):—

Now, what is the case, according to the language of sect. 69 of the *Trade Marks Act* of 1883, under which the application is made which stands for determination. It is the question of the registration of the particular mark brought in, and where it is asserted that it is an old mark, as in the case before me, the application is, as a whole, to register the entire mark as brought in as an old mark. The Court then has to determine whether in the case before it this application has to proceed or not. I need scarcely observe that if another or different mark were brought in, that would have to be advertised again, and other opponents who might not think fit to come forward and oppose

(1) 29 Ch. D. 551.
(2) 4 D. J. & S. 380.
(3) 26 Ch. D. 398.
(4) 32 Ch. D. 311.
(5) 51 L. J. (Ch.) 639, n.
(6) 3rd Ed. p. 384.
(7) 54 L. J. (Ch.) 1003.
(8) 59 L. T. (N.S.) 820.
(9) 42 Ch. D. 274.
(10) Ibid. 566.

CHITTY, J. 1890 *In re* MEEUS' APPLICATION.

the registration of the particular mark which they have seen, might for good reasons come forward to oppose an application which was to register, say, a part of the whole mark that was originally brought in. It is conceivable that it might be much more injurious to certain traders that a part of the whole thing proposed, should be registered, than that the whole thing should be registered. [His Lordship then stated the evidence as to user, remarking on the unexampled way in which the Applicants' case had been presented, being supported only by the recollection of witnesses, not one of whom was able to speak as to having seen the mark in its present form, until just about the time of swearing their affidavits, and continued :—] The result, then, is, that the Applicants have failed to prove any user of the mark proposed as a whole, in the *United Kingdom*, or, indeed, I might add, elsewhere, before the 13th of August, 1875, and it therefore becomes unnecessary to consider the evidence of user of part of the mark, namely, the key with or without the ears of corn, which has been adduced on the part of the Applicants as having taken place before the statutory date, because, in my opinion, the question I have to consider, and the question which is propounded for determination on the part of the Applicants, is the user of the mark as a whole, though upon this point also, if and so far as it should be necessary to consider the evidence of alleged user in detail, I state my opinion, that the result, without going into details, is adverse to the Applicants.

Of the many authorities that were cited at the Bar, it is not necessary to mention more than two, because I may observe in passing that there were a great many questions argued which, in my opinion, do not really arise, when the true nature of the application is considered. The first is *In re J. B. Palmer's Trademark* (1), which has been followed in many subsequent cases. There *Palmer* proposed for registration three words, "*Braided Fixed Stars*," and the Court of Appeal having given the applicants an opportunity of adducing further evidence on a point which the Court of Appeal thought was, as it stood, open to doubt, namely, whether these three words had been used separately before the 13th of August, 1875, the offer was declined,

(1) 24 Ch. D. 504.

and the result was, that the Court of Appeal necessarily drew the inference of fact, that the words "*Braided Fixed Stars*" had not been used separately as a trade-mark before the date in question, and then they held as a matter of law, as I had held in the Court below, that *Palmer* could not register a part of the entire mark which he had used as a trade-mark before the statutory date. That case, therefore, decided that where the mark proposed to be registered was less than the whole used before the date in question, registration could not be permitted; and it seems to follow from that, that the applicant who comes forward and alleges that the mark which he proposes for registration has been used before the statutory date, has to shew that it has been used just as he proposes it should be registered, that is to say, the whole combination. I am not speaking of slight immaterial differences, but substantially the whole. Now, in the case before me, unquestionably the words "*Geneva Key Brand*" form a very important and material part of the trade-mark.

The other authority I have referred to is one that was cited by the Applicants' counsel with a view to induce the Court to give a direction to the Comptroller to proceed, not with this application but some other application, namely, an application to register the key with the corn ears, and with this object reliance was placed upon the order of the House of Lords in *Orr-Ewing* v. *Registrar of Trade Marks* (1), in which a direction was given to the Registrar to proceed with *Orr-Ewing's* application to register as trade-marks the distinctive devices of animals on the labels with the name and address of *Orr-Ewing's* firm. The labels contained something more than the devices of animals; but it is important to see how that case came before the House of Lords. As is well known, the business of forming the first register of trade-marks was found to be so serious and so large as regards textile goods, that a committee of experts was appointed in regard to goods of this class for the purpose of sifting the various trade-marks used in that trade. The committee were appointed under general orders which had a statutory effect, and it was their duty to divide the marks that were brought before them into two classes; one class, the first class, being those which they

(1) 4 App. Cas. 503.

CHITTY, J.

1890

In re MEEUS' APPLICATION.

considered fit and proper to be registered, and the other, the second class, being those that they thought were not proper to be registered; and it was part of the orders which had, as I say, a statutory effect, that it should not be lawful for the Registrar (that was then the title of the officer who had the control of the register) to register any person as proprietor of any cotton mark in the second class of the list except in pursuance of an order of Court. An application for such an order was made to the Vice-Chancellor *Hall*, and he directed the Registrar to proceed; but the Court of Appeal were of a different opinion, and held that the committee of experts was a tribunal in the nature of a tribunal of commerce, and that in dealing with their decision the Court ought not to interfere, unless satisfied they had proceeded upon some wrong principle, or in some improper manner. The House of Lords, however, overruled that decision, and looked into the marks of *Orr-Ewing* themselves, and, after examining them, thought that they had shewn a *primâ facie* case for being allowed to proceed with an application for registration of the distinctive devices that I have already referred to. The result, therefore, of that decision was simply to remove what was a statutory impediment, or *quasi*-statutory impediment, or bar that had been placed against the Registrar, even entertaining the question of the application. The House of Lords did not decide that Messrs. *Orr-Ewing* were entitled to register the device, as is explained in the speeches of the noble Lords, Lord *Cairns* and others; they left the question entirely open, so that they merely removed that initial difficulty which stood in *Orr-Ewing's* way by reason of the decision which the committee of experts had come to. Mr. *Orr-Ewing*, after he obtained the order of the House of Lords, had to start before the Registrar afresh, and his marks had to be advertised, so that any opposition which persons interested thought fit to make could be brought forward. That case, therefore, is no authority for the proposition on which the Applicants' counsel rely; it is difficult exactly to ascertain the nature of the proposition that they put forward; but it seems as if they were asking me now judicially to amend the application that has been made before the Registrar, and stands for my decision at present. Obviously the decision of the House of Lords does not affirm

that proposition. Here, as I have said, I have to determine in my judgment, aye or no, whether the Registrar is to proceed with this application.

Then an ingenious suggestion was made by Mr. *Chadwyck Healey* for the first time in his reply as to disclaimer, and the suggestion appeared to be in some way or other that the Applicants were entitled, here in Court, to disclaim some parts of the trade-mark proposed for registration. After some little discussion, as I understood the proposition, the proposal was, now to disclaim the whole of the trade-mark that has been brought in for registration except the key and the signature. Now, on this suggestion or argument, reference was made to the 74th section of the Act of 1883, which is to the effect that nothing in the Act is to be construed to prevent the Comptroller entering on the register as an addition to any trade-mark in the case of a mark in force before the 13th of August, 1875, "Any distinctive device, mark, brand, heading, label, ticket, letter, word, or figure, or combination of letters, words, or figures, though the same is common to the trade in the goods with respect to which the application is made." And by the 2nd sub-section of that section: "The applicant for entry of any such common particular or particulars must, however, disclaim in his application any right to the exclusive use of the same, and a copy of the disclaimer shall be entered on the register." In passing, I merely mention that that subsection has been repealed by the Act of 1888, and other provisions have been substituted for it. The disclaimer, therefore, according to the section, must be in the application. The words are express. Nothing is said about the disclaimer at the Bar in the course of the determination of the matters which I have to determine under the 69th section. And, further, the disclaimer that is required here is a disclaimer of any such common particular or particulars. Such common particular or particulars means words and so forth which are common to the trade. There is no pretence for saying that the important words "*Geneva Key Brand*" are common to the trade, because, according to the case for the Applicants, there are but two traders dealing with this country who are entitled to use that term—that is, the Applicants and the Respondents. The evidence which I have briefly referred to at

BIBL. LONDIN UNIV.

CHITTY, J. 1890 *In re* MEEUS' APPLICATION.

the commencement of this judgment shows, that "*Geneva Key Brand*," or the "*Key Brand Geneva*," is a term which for twenty years and upwards has been the designation in the market by which the Respondents' goods have been known. The result is, that there is no ground for the suggestion that any disclaimer could be made in such a case as this under these special statutory enactments at the Bar, because the disclaimer is too late, and the proposed disclaimer is not within the enactment. There is another point upon which the Respondents have relied, viz., that to allow this mark to go on the register would be to place on the register, or to allow that there should be placed on the register, a mark calculated to deceive the public. It is not necessary for me to determine that question, because what I have already stated is sufficient in my judgment to dispose of the application; but it must not be for a moment assumed that I have arrived at any conclusion adverse to the Respondents on that ground. As the case stands, though I am not called upon to decide it judicially, my strong impression is that it would be calculated to deceive, and, as the Respondents have alleged, to injure them in the trade which they have established for years in this country. The result is, that I think *Louis Meeus*' application fails, and I must dismiss it with costs.

Solicitors: *Hollams, Son, Coward, & Hawksley; F. A. Rehder.*

W. C. D.

FILLINGHAM *v.* WOOD.

CHITTY, J.

1890

Nov. 7, 14.

[1890 F. 1625.]

Party Structure—"Owner"—"Adjoining Owner"—Tenement—Notice by Building Owner—Injunction—Metropolitan Building Act, 1855 (18 & 19 *Vict. c.* 122), *ss.* 3, 82, 85, *sub-s.* 1 [*Revised Ed. Statutes, vol. xii., pp.* 755, 774, 775.]

A tenant in possession of part of a house under an agreement for a greater interest than as tenant from year to year is an "adjoining owner," under the *Metropolitan Building Act*, 1855 (18 & 19 Vict. c. 122), and entitled to be served with three months' notice under sect. 85, sub-sect. 1, before any alterations affecting his premises can be commenced by the "building owner"; in such a case service of a three months' notice on the person in receipt of the whole of the rents of the tenement is not sufficient.

Cowen v. *Phillips* (1) stated and followed.

Hunt v. *Harris* (2) discussed and explained.

MOTION.

The Plaintiff, *Walter Rix Fillingham*, carried on business as a tailor, and resided at No. 41, *Margaret Street, Cavendish Square*, where he occupied a shop and parlour, with a workshop adjoining, the front kitchen, and a back bedroom on the third floor, under an agreement for a term of three years, from the 1st of February, 1890, renewable at the expiration of such term for another three years. The Plaintiff's landlord, one *J. Smith*, who held the whole house on a long lease from the Crown, occupied the front room on the third floor, but, having sub-let part to the Plaintiff as aforesaid and part to another tenant, was in receipt of the whole of the rents of the rest of the house.

In May, 1890, the Defendant *Wood*, the owner and occupier of the adjoining house, No. 40, *Margaret Street*, contemplated pulling down and rebuilding his premises; but before doing so, he, on the 16th of May, signed and posted the usual party-wall notice to *J. Smith*, at 41, *Margaret Street*, in a registered letter. This notice, which was in the printed form sanctioned by the Metropolitan Board of Works, sealed as required by sect. 59 of the Act, and the one generally used by *London* architects and

(1) 33 Beav. 18.

(2) 19 C. B. (N.S.) 13.

CHITTY, J. 1890 FILLINGHAM v. WOOD.

surveyors, was headed and addressed: "To *J. Smith*, of 41, *Margaret Street*, and whomsoever it may concern." After the expiration of this notice, the Defendant commenced to pull down No. 40, *Margaret Street*, and in so doing interfered with the upper part of the party-wall between 40 and 41, *Margaret Street*, thereby, as the Plaintiff alleged, rendering his bedroom on the third floor uninhabitable for the time being.

On the 16th of October, the Plaintiff commenced the present action against the Defendant *Wood* and his builders, claiming damages for wrongfully pulling down the party-wall, and an injunction to restrain the Defendants, their servants and agents, from continuing the pulling down of the said wall, and on the same day obtained *ex parte* from the vacation Judge an interim injunction in the terms of the writ.

The Defendant *Wood* had not given the Plaintiff any notice of the proposed alterations, his case being that the Plaintiff was not "an adjoining owner" entitled to notice, and that the notice sent to *J. Smith* was sufficient in all respects. There was evidence that in carrying out the rebuilding of the Defendant's premises it was intended to take down the party-wall so as to leave exposed to the air a part of the back bedroom occupied by the Plaintiff; the operations also affected the flue of this room, and some of the chimneys used by the Plaintiff, thereby preventing him from lighting a fire in some of the rooms.

The Plaintiff now moved to restrain the Defendants, their workmen and agents, until the trial, from pulling down or otherwise interfering with the party-wall.

Byrne, Q.C., and *E. Ford*, for the Plaintiff:—

The Plaintiff is in occupation of "a tenement," under a three years' agreement, and is, therefore, within the definition of "owner" in sect. 3. The fact that he is not in occupation of the whole house makes no difference: if the receipt of "part of the rents and profits of any land or tenement" is enough, occupation of part of the tenement is enough too. By sect. 82, which begins to deal with the rights of building and adjoining owners, "owner" is again used as meaning the person already defined by sect. 3, and so on through the subsequent sections; the Plaintiff,

therefore, is an "adjoining owner," and entitled to notice under sect. 85, sub-sect. 1; and the Defendant, as the "building owner," had no right to interfere with the party-wall until he had given the Plaintiff three months' notice.

Wheeler v. *Gray* (1) seems to contemplate the possibility of there being more than one "owner" to be served with notice under sect. 85, sub-sect. 1; and sect. 97, sub-sect. 2, provides that "if there are more owners than one," every owner shall be liable to contribute to certain expenses. There need be no difficulty in finding out who is to be served as owner, because sect. 98 provides for giving notice by putting it up on some conspicuous part of the building. Nothing of this kind was done. The Defendant *Wood* had no right to interfere with the party-wall till he had given the Plaintiff proper notice; and under the circumstances the Plaintiff is entitled to an injunction.

Romer, Q.C., and *E. S. Ford*, for the Defendants:—

Sect. 3, in defining "owner," contains no reference to occupation of part of a tenement. *Smith*, the landlord, is in receipt of the rent, and is the only "owner" whom it was necessary to serve with notice. The Act never intended to put the building owner to the trouble and expense of finding out every possible occupier. No case has decided that the lessee of one floor for a longer period than from year to year is an adjoining owner within the statute: *Hunt* v. *Harris* (2); and in the same case *Byles*, J. (3), seems to think that "owner" means a person having an estate or interest in the whole of the premises, not an estate in a room or a closet. True, *Hunt* v. *Harris* was a case on the question of the liability of an adjoining owner to contribute to the expenses of rebuilding a party-wall by his neighbour; but the principles of that decision apply. [They also referred to *Reg.* v. *Lee* (4); *Caudwell* v. *Hanson* (5); and *Woolrych Metropolis Local Management Acts* (6).]

The Defendants have followed the invariable practice of *London* surveyors and architects, and served the person who is

(1) 4 C. B. (N.S.) 584.
(2) 19 C. B. (N.S.) 23, *per* Erle, C.J.
(3) Ibid. 27.
(4) 4 Q. B. D. 75.
(5) Law Rep. 7 Q. B. 55.
(6) 2nd Ed. p. 296.

CHITTY, J. 1890 FILLINGHAM v. WOOD.

in receipt of the rents or profits, and he is the only person entitled to be served with notice as "adjoining owner."

Byrne, in reply:—

Hunt v. *Harris* (1) is not applicable; but in *Cowen* v. *Phillips* (2), a tenant in possession of part of a house, though only having an equitable interest under an agreement for a lease, was held to be an adjoining owner.

E. S. Ford, in reply, on fresh case cited:—

In *Cowen* v. *Phillips* there were two separate doors, and the Plaintiff was in possession of a separate tenement; besides, the whole object of that decision was to protect a person having an equitable interest.

CHITTY, J. (after stating the facts, continued):—

The only question for decision is whether the Plaintiff was entitled to have three months' notice of the alterations proposed to be made by the Defendant before he commenced operations, and that question depends mainly upon the 3rd, 82nd, and 85th sections of the *Metropolitan Building Act*, 1855. I think any judge who reads that Act, and has to construe it, will at least agree with the observations of Mr. Justice *Montague Smith* in the case of *Hunt* v. *Harris* (3), that it would be difficult to put a definite construction upon that Act of Parliament, and that the best course is to deal with each case as occasion arises. I shall therefore not attempt to give any exhaustive judgment on the true interpretation of this Act. I turn to sect. 3, and find that "'owner' shall apply to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement, other than as tenant from year to year, or for any less term"; the term "owner" applies therefore to every person who possesses either of the two qualifications which are mentioned; it applies to every person in possession of the land or tenement, or in receipt either of the whole or any part of the rents or

(1) 19 C. B. (N.S.) 13. (2) 33 Beav. 18.
(3) 19 C. B. (N.S.) 41.

profits of any lands or tenements; but it applies equally to any person who is in occupation of the land or tenement for a greater interest than the excepted interest. Now, the Plaintiff is in possession and occupation of the rooms I have mentioned for a greater interest than the excepted interest. It is observable that in the definition of "owner" the words "whole, or any part of the rents or profits" are made use of, but that the clause does not go on to speak of the person being in occupation of any part of the land or tenement; and indeed it would have been difficult to put in such words with reference to land or tenement. I think, however, that the true interpretation of the last portion of that definition is to see whether the tenement is held under a title separately. Then, turning to the 82nd section, I find that, "In the construction of the following provisions relating to party structures, such one of the owners of the premises"—that term owner is evidently used in the statutory sense of the term—"separated by or adjoining to any party structure as is desirous of executing any work in respect to such party structure shall be called the building owner, and the owner of the adjoining premises shall be called the adjoining owner." Then the 85th section runs thus: "The following rules shall be observed with respect to the exercise by building owners and adjoining owners of their respective rights:—(1.) No building owner shall, except with the consent of the adjoining owner, . . . exercise any right hereby given in respect of any party structure, unless he has given at least three months previous notice to the adjoining owner" in the manner there prescribed. It is plain, therefore, that the building owner must give notice to every person who, according to the definition, is "owner," adding, of course, the epithet "adjoining." It is quite clear that the Act of Parliament contemplates the case of certain persons who would be affected and put to inconvenience by the building owner who are not persons entitled to receive a notice as adjoining owners. Take the case of a person in occupation of an entire house, but who only holds it for six months. I suppose in the general public interest with regard to building within the metropolitan area, it was considered that he must put up with inconvenience at least to this extent, that he is not entitled to

CHITTY, J. 1890 FILLINGHAM v. WOOD.

have notice given him by the building owner. Now, I have to find out from these sections whether the Plaintiff is entitled to a notice or not. I have said that in respect of his interest he is clearly an "adjoining owner." The only question is whether he ought to be held not to be an adjoining owner because he does not hold the entirety of the house. I think, however, on the true construction of this Act (which, I admit, is very difficult to construe), he does hold a tenement within the meaning of the interpretation clause. There are many other parts of the Act which may be referred to with a view of ascertaining the true interpretation of this somewhat complicated Act of Parliament, and which may throw some light upon the subject. I refer to them, but I do not think it necessary to mention them in detail. It is obvious, of course, to any lawyer, that one of the difficulties in interpreting an Act of this kind arises from the fact that Parliament has seized hold of the term "owner" as a convenient term to use, and then applied it by means of a definition, and the difficulty arises from this definition not being so clear as to be free from all ambiguity. There are, however, two decisions on this word adjoining owner, by both of which I consider myself bound. One is relied upon by the Plaintiff, and the other is relied upon by the Defendants. The first is the case of *Cowen* v. *Phillips* (1), and no doubt the observations which Mr. *Ford* made upon that case are correct. There the point argued was, whether a person having a greater equitable interest than merely as tenant from year to year was within the intention of the Act. *Cowen*, the plaintiff, was in possession of the shop and parlour on the ground floor, and two kitchens in the basement which were part of the house—being, as is stated in the report, part of No. 3, *Bruton Street, Bond Street*—and he received no notice, and the defendant commenced to knock holes in the party-wall exposing part of the shop. Sir *John Romilly* held that an equitable interest was sufficient, and that the plaintiff was entitled to notice. Therefore, thus far, I have a case in which a judicial interpretation has been put upon this statute some twenty-seven years ago, applicable, so far as I have stated the facts, to the case which is before me now. But, no doubt, there does appear

(1) 33 Beav. 18.

in the judgment a statement that the house was divided into two, with two doors, and it is said that that is sufficient to distinguish that case from the one which is now before me. In my opinion, that distinction is insufficient. I agree that there was, so far as the report goes, no critical examination of the statute itself, and that the main point which was dealt with was this question of the equitable interest.

The other case is *Hunt* v. *Harris* (1). In that case *Cowen* v. *Phillips* (2) was cited, and I think, without reading the judgments, I may say, was approved by the Judges. The Chief Justice *Erle*, Mr. Justice *Byles*, and Mr. Justice *Montague Smith* all mentioned it. They do not mention it, I agree, as a decision on any other question than the main question, as to the equitable interest of the plaintiff *Cowen*; but they had the case before them, they spoke of it with approval, and certainly without disapproval, and in the full report which is given of the argument of the case (3) *Cowen* v. *Phillips* is completely stated. Now *Hunt* v. *Harris* itself was a case which turned mainly upon the 97th section, and the point for determination was whether *Harris* was liable to be sued for contributions by *Hunt*, the building owner. *Harris* had let all the rooms in the house separately to different tenants, some of the rooms being let at least for longer terms than year to year; but *Harris* was in receipt of the whole of the rents and profits of the tenements, and the judgment went against him upon the ground that he at least was liable to contribute, and that he could, either under the statute or under contract, recover over his fair proportion of the expenses which he would have to pay, from his tenants. Without reading the judgment through, which is quite unnecessary, I think the sum of the Chief Justice's judgment is to be found towards the end of the judgment (4):—"According to the best interpretation I can put upon the statute, the building owner has a right to call upon the person who holds the entire premises for a long term, and is substantially in possession of all the rents and profits. I do not mean to say that the owner in fee simple may not also be liable. But I can

(1) 19 C. B. (N.S.) 13.
(2) 33 Beav. 18.
(3) 19 C. B. (N.S.) 28, 29.
(4) Ibid. 37.

CHITTY, J. 1890 FILLINGHAM v. WOOD.

see my way clearly to the conclusion that the owner of a long term, who is in receipt of the rents and profits, is liable." There are other parts of the judgment which I will not stay now to quote; but the substance of that judgment and of the other judgments is that *Harris* at least was liable. Then Mr. Justice *Byles* raised a question of this sort, whether the under-tenants had any interest in the wall, and there may have been something in the facts of that case which justified the conclusion which he apparently came to—or which, at any rate, he was supposed to have arrived at—namely, that the party-wall had not been demised so that the under-tenant had no interest in it. I cannot assume that Mr. Justice *Byles* intended to decide that where a part—say the upper part—of a house is let to a tenant he has no interest in the party-walls, that the landlord can take down the party-walls and leave the rooms bare and open to the sky; but he did say (1), "I do not find that he"—that is, *Harris*—"has demised any portion of the party-wall"; and upon the facts of that case that statement may have been justifiable. Unquestionably, at first sight there seems to be some slight inconsistency in holding that under the construction of this statute the adjoining owner who is bound to contribute to the building owner the expense is not the same person as the adjoining owner entitled to notice before the work is commenced. But I think there is no inconsistency. The point of law is that the Court of Common Pleas said that *Harris* at least is liable and could have got his contribution over because he is one of the persons at any rate who under the definition clause is owner; and they held in effect that it was not necessary for the plaintiff *Hunt* to sue every owner; but such an interpretation cannot, it seems to me, be put on the 85th section. The 85th section requires that notice should be given to the "owner," which includes every person within the language of the interpretation section. To go back to what I consider the substantial point which Mr. *Ford* has attempted to raise by reference to the decision of *Cowen* v. *Phillips* (2), I put this case. Supposing that there are two owners in fee simple of a house, one being the owner of the lower part of the house, and the other the owner of the upper

(1) 19 C. B. (N.S.) 41. (2) 33 Beav. 18.

part of the house, and the owner of the upper part of the house has the right of access of the staircase through the doorway and along the staircase to get to his upper part. In such a case as that, I should take it to be clear that notice must be given to both of those owners. The Act imposes on the building owner the duty of finding out who is the adjoining owner. I am not dealing with a case of dangerous structure, but I am dealing with a case of an alteration in a party-wall for the convenience and for the benefit of the building owner. The 98th section relieves the building owner from a difficulty which conceivably he might be in, of not being able to find out who the adjoining owner is, by providing in substance in cases where he clearly cannot find him out that he may put up a notice on a conspicuous part of the building. To revert once more to the facts of this case, the Plaintiff is the person who will suffer loss and inconvenience by the operation of the building owner; and I think it would be wrong, and a narrow interpretation of those parts of the Act with which I have specially to deal, if I held that he was not entitled to notice. Therefore, I think that substantially the case is concluded by the case of *Cowen* v. *Phillips* (1) which was before Sir *John Romilly* twenty-seven years ago, and I shall grant the Plaintiff an interim injunction.

Solicitors: *Cooper & Bake; Hedges & Brandreth.*

(1) 33 Beav. 18.

W. C. D.

NORTH,
1890
Nov. 6, 7.

In re HARDING'S ESTATE.

[1890 H. 1103.]

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 3, 63—*Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *s.* 6, *sub-s.* 1, *s.* 7, *sub-ss. i., ii.*—*Trust for Sale.*

In a case where land was held on trust for sale and there were no trusts prior to the interest of tenants for life of the income, leave was given to the tenants for life under sect. 7 of the *Settled Land Act*, 1884, to sell such of the land as remained unsold.

THIS was a summons on the part of *Jane Smith* and *Elizabeth Smith*, persons claiming to have, under sect. 63 of the *Settled Land Act*, 1882, the powers of a tenant for life of certain real estate comprising two farms in *Herefordshire*, settled by the will and codicils of *John Harding* deceased.

The testator died in April, 1884. He appointed *John King* and *John Wigram*, the Respondents to the summons, his executors and trustees. He bequeathed various charitable legacies, which he directed to be paid out of such part of his personal estate as might by law be bequeathed for charitable purposes in preference to any other payment thereout. He bequeathed a number of other pecuniary legacies. He gave directions that his debts, funeral, and testamentary expenses should be paid out of his residuary personal estate, and that, if the residuary personal estate should be insufficient, his debts, funeral, and testamentary expenses and legacies (other than charitable legacies) should be paid out of the proceeds of sale of his residuary real estate. He devised his residuary real estate to *John King* and *John Wigram* upon trust to sell the same and invest the proceeds, together with the proceeds of his residuary personal estate, and hold the fund upon trust for the Applicants *Jane Smith* and *Elizabeth Smith* during their joint lives and the life of the survivor, and after the death of the survivor for their children in manner therein mentioned; and, in case there should be no child of either of them who should attain a vested interest, upon trust for the Respondents, *John King* and *John Wigram*, for their own benefit. Neither the will nor any of the codicils contained any power to postpone the

sale of the testator's residuary real estate, except as to a house which the Applicants were permitted to reside in. The testator directed that *John Wigram*, who was an estate agent, should be allowed to charge his usual and ordinary commission on the rents of the testator's *Herefordshire* estate notwithstanding that he was appointed a trustee and executor.

The Applicants had neither of them been married; they were of the respective ages of fifty-three and forty-nine.

The trustees put up for sale by auction the testator's residuary real estate, which was situated in *Herefordshire*. Only small parts of the estate were then sold. The unsold part, other than the house in which the Applicants resided, consisted of two farms, *Lynch Court* and *Hardwick*.

The residuary personal estate was insufficient to pay all the debts and legacies, and in 1885 an action for the administration of the testator's estate was instituted in the Chancery Court of County Palatine of *Lancaster*, in which the trustees were plaintiffs, the tenants for life and the treasurer of a representative charitable institution were defendants. An inquiry was directed in that action whether it was fit and proper and for the benefit of all persons interested that the sale of any part of the testator's real estate directed to be sold should be postponed, and whether it was fit and proper and for the benefit of all persons interested that the legacies (other than charitable legacies) should be raised by mortgage of any part of the real estate directed to be sold.

The first part of the inquiry was answered in the affirmative by certificate of the District Registrar, dated the 16th of February, 1888. In the meantime, under an order made on further consideration, dated the 10th of January, 1887, a sum of £7000 had been raised by mortgage of estate; and on the 6th of January, 1888, an order was made that, notwithstanding the judgment in the action and the order on further consideration, that the Plaintiffs (the trustees) should be at liberty to exercise out of court the trust for sale.

The summons asked—(1) that the Applicants might be authorized to exercise, pursuant to the 63rd section of the *Settled Land Act*, 1882, the powers of sale by the 3rd section of the same Act conferred upon a tenant for life, and (2) directions as to costs.

NORTH, J.

1890

In re HARDING'S ESTATE.

A contract had now been entered into by the trustees for the sale of one of the farms which the present Applicants wished to have carried out. There was evidence that repairs had to be done from time to time which could only be paid for out of income.

Cozens-Hardy, Q.C., and *R. J. Parker*, for the tenants for life:—

The Court is in no way precluded from allowing the tenants for life to sell by reason of anything that took place in the administration action. The finding some time ago that it was not for the benefit of parties interested that there should then be a sale may have been some protection to the trustees in not selling, but could not affect the right of the tenants for life, if they have such right, to sell the estate. It would be contrary to the policy of the Act to allow them to fetter themselves by a consent to such order, or to impose such fetter on them *in invito*. The fact that a contract has been entered into for the sale of part of the land shews that the trustees themselves no longer consider the finding applicable. Looking at the position of the parties and the circumstances of the estate, it is fair that the tenants for life should be immediately allowed to sell. There is evidence that outlay is required which must fall on the tenants for life, and the trustees themselves are practically entitled to the immediate remainder.

Under the Act of 1882, taken by itself, the tenants for life would have had an absolute right to sell, the trustees for sale being ousted of their power unless with consent of the tenant for life. It was found, however, that in some cases there was difficulty, a difficulty illustrated by *Taylor* v. *Poncia* (1), a case which Mr. Justice *Pearson* held to be outside sect. 63 of the Act of 1882. And in consequence of the difficulties thus brought to light the later Act was passed cutting down the power of the tenant for life to sell lands held on trust for sale to cases only where he could get the leave of the Court. In this case the tenants for life are practically in the position of tenants for life of land in possession, and the leave ought to be given.

(1) 25 Ch. D. 646, 648.

Alfred Hopkinson, for the trustees:—

There was an order of the Palatine Court to the effect that a sale was not desirable. No fresh circumstances have been shewn.

The *onus* under the *Settled Land Act*, where there is a trust for sale, lies on the tenant for life, to shew that he ought to have the power given him to the exclusion of the persons denominated for that purpose by the settlor. No reason has been shewn why they should not carry out the trust reposed in them either from the nature of the case or by any suggestion of breach of trust.

NORTH, J. (after referring to the proceedings in the County Palatine Court, continued):—

The report was made nearly three years ago, and nothing further was done in the Palatine Court. The tenants for life now come and say they ought to be allowed to exercise the powers conferred upon them by the Act.

Now it is well known what the object and scope of the Act of 1882 was. It was, in general terms, to make the tenant for life of land the person to decide when and how and under what circumstances the land of which he is tenant for life is to be put on the market. That applied, so far as the general powers given by the Act are concerned, to land held as land, and did not apply to land subject to a trust for sale with trusts declared of the money to be raised by the sale. It is clear, I think, that land subject to such a trust for sale would not have been within the terms of the Act, except for sect. 63 of the Act, because that section expressly deals with land settled by way of trust for sale: it provides that such land is to be deemed settled land, and the instrument under which the trust for sale arises is to be deemed a settlement: "and the person for the time being beneficially entitled to the income of the land, estate or interest aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof." Upon that part of the Act difficulties arose in some cases (not simple cases) in respect of land subject to a trust for sale, and so coming within that section. Very often the land was to be sold and the proceeds to be applied in a

NORTH, J.
1890
In re HARDING'S ESTATE.

number of different ways—for instance, in the payment of funeral expenses, or of debts, or of legacies. Then, subject to making provision for all those objects, there was a trust for investment of the surplus. In such cases difficulties arose as to the exact application of the Act to land brought within its terms by sect. 63; as, for instance, whether having regard to the 56th section, the trustees for sale could sell without the consent of the tenants for life of the proceeds. In the case of *Taylor* v. *Poncia* (1) Mr. Justice *Pearson* took the view that trustees for sale were not precluded by the 56th section from selling without such consent, at any rate in that particular case. That solved the difficulty to a limited extent. To get rid of the difficulty more completely the Legislature passed the 6th and 7th sections of the Act of 1884. Sect. 6 (1) provides: "In the case of a settlement within the meaning of section sixty-three of the Act of 1882, any consent not required by the terms of the settlement is not by force of anything contained in that Act to be deemed necessary to enable the trustees of the settlement, or any other person, to execute any of the trusts or powers created by the settlement." That seems to me a recognition of the decision in *Taylor* v. *Poncia* as applicable not only to cases of a complex character but to every case. In fact, the right of the trustees for sale to sell without the consent of the tenant for life is made clear. The tenant for life is not to be the person to direct how the land subject to the trust for sale is to be put on the market. Then, to prevent the Acts conflicting, the Legislature went on to provide by sect. 7: "With respect to the powers conferred by section sixty-three of the Act of 1882, the following provisions are to have effect: (i.) Those powers are not to be exercised without the leave of the Court; (ii.) The Court may, by order, in any case in which it thinks fit, give leave to exercise all or any of those powers, and the order is to name the person or persons to whom leave is given." The effect of the two sections is, that the trustees for sale and not the tenant for life are the persons who are to have the conduct of a sale; but the Court is to have power to allow the tenant for life to exercise the power: and if the Court thinks the tenant for life is the proper person to do so, the trustees are

(1) 25 Ch. D. 646.

displaced. I think the object of the Act is to give the tenant for life the power to sell in such a case as this, and that I ought to give that leave, which I am enabled to give by sect. 7, to the tenants for life. I find that there are no interests now subsisting prior to the interests of the tenants for life. The proceeds of sale belong to the tenants for life with remainder to persons who happen to be trustees for sale. That is the simplest possible case, and if I were not to say that the tenants for life were to have leave I cannot imagine any case in which leave should be given.

It was suggested that the object of sect. 7 was to enable the Court to assist the tenant for life in preventing a breach of trust. But there are other well-known effective ways in which that can be done; and I think the Legislature considered that the tenant for life should have leave given him in cases like the present to exercise the power of sale.

The only question remaining is that raised on the order and report of the Palatine Court. I do not feel any difficulty as to that. Supposing the order had been made by myself, I should have thought this a case in which it was my duty to give leave to the tenant for life, notwithstanding the finding in the certificate; and if it had been made by another Judge of the Chancery Division, I should have thought the same; and although the Court that made the order is one sitting in a different jurisdiction, the reason of the case is the same, and I feel bound to say the case is one in which the tenants for life ought to have this power.

Solicitor for the tenant for life: *J. Percy Chadwick*, agent for *Buck, Dicksons, & Cockshott, Southport.*

Solicitors for the trustees: *Phelps, Sidgwick, & Biddle*, agents for *Sale Seddon & Co., Manchester.*

D. P.

C. A.
1890
NORTH, J.
July 12.
C. A.
Nov. 15.

In re WEYMOUTH AND CHANNEL ISLANDS STEAM PACKET COMPANY.

Company—Increase of Capital—Shares Issued at a Discount—Ultrà Vires—Winding-up—Surplus Assets—Distribution—Rights of Original and Discount Shareholders—Contract.

A company was incorporated in 1857 with limited liability, by registration under the *Joint Stock Companies Act*, 1856. The capital was divided into £10 shares, and the shares issued were paid up in full in cash. In 1861 the company was in difficulties, and the market value of the shares was only £3 per share. The company resolved to increase their capital, and special resolutions were passed (after notice sent by post to every shareholder in accordance with the company's regulations) to increase the capital by the creation of additional £10 shares, which, as well as the unissued original shares, were to be issued at a discount of £7 per share. In pursuance of these resolutions, notices offering the new shares for subscription were sent to all the existing shareholders, and thereupon a number of shares were applied for and issued as fully paid up, on payment by the allottees of only £3 per share. The shares thus issued were treated for upwards of twenty years, as to payment of dividend and otherwise, in every respect on the same footing as the original shares. In 1889 the company resolved on a voluntary winding-up. The creditors were all satisfied, and there remained a surplus of £25,000 for division among the shareholders. The liquidator applied to the Court to determine the mode in which the fund ought to be divided:—

Held, by *North*, J., that though the issue of shares at a discount was illegal as being *ultrà vires*, the holders of the shares so issued could not under the circumstances repudiate their shares, but that they must be treated as shareholders having paid only £3 per share:

Also, on the authority of *Ex parte Maude* (1), that out of the surplus (after payment of costs) the sum of £7 per share must first be paid to the original shareholders, and that the residue of the fund must then be divided rateably among all the shareholders.

Held, on appeal, that the contract entered into by the holders of the discount shares was a contract as between themselves and the company alone and *ultrà vires*; and that as between those shareholders and the old there was no contract, either express or implied, that in the event of the company's debts being satisfied and there being surplus assets, the new shareholders should be entitled to any priority or advantage in the distribution of those assets.

North, J., affirmed.

PETITION by the liquidator appointed in the voluntary winding-up of this company, presented under the provisions of

(1) Law Rep. 6 Ch. 51.

sect. 138 of the *Companies Act*, 1862, for the determination by the Court of questions as to the division of the surplus assets of the company among the shareholders.

The company was formed on the 14th of April, 1857, with limited liability, by registration under the *Joint Stock Companies Act*, 1856, its objects, as stated by the articles of association, being the conveyance of passengers, goods, and merchandize between the port of *Weymouth* and the islands of *Guernsey* and *Jersey*. The original capital was £40,000, divided into 4000 shares of £10 each.

The articles of association provided that the company might by special resolutions, as thereinafter provided, increase its capital to a sum not exceeding £100,000; that the additional capital might be raised by shares of the same amount as the original shares, and that such capital should for all purposes be considered part of the original capital, and subject to the same provisions in all respects, whether with reference to calls or forfeiture or otherwise, as if it had been part of the original capital. Clause 84 provided that the directors might, with the sanction of the company in general meeting, declare a dividend to be paid to the shareholders in proportion to their shares. The articles did not contain any provision with respect to the distribution of the surplus assets of the company among the shareholders in the event of a winding-up.

Prior to the passing (in the year 1861) of certain special resolutions (hereinafter stated), for the increase of the capital of the company, the company had issued 3016 shares, of which 99 were afterwards forfeited for non-payment of calls. The remaining 2917 of the shares so issued were all fully paid up in cash. The business of the company was never carried on at a profit, but interest was paid to the shareholders by means of sums of money provided by the *Great Western Railway Company*, under working agreements from time to time made between the two companies.

By the year 1861 the company had incurred heavy losses, and the market value of its fully paid-up £10 shares was only £3 per share. The company applied to the *Great Western Railway Company* for further assistance, which the railway company

C. A. 1890 *In re* Weymouth and Channel Islands Steam Packet Company.

agreed to give, on the terms of the *Weymouth Company* agreeing to raise further capital for the purposes of its undertaking to the amount of £9000, by the issue of 3000 £10 shares as fully paid at the price of £3 per share (that is, at a discount of £7 per share).

Accordingly, special resolutions of the *Weymouth Company* were passed and confirmed at extraordinary general meetings, held respectively in *Jersey* on the 29th of May and the 10th of July, 1861. The resolutions were to the following effect:—

"That the capital of this company be forthwith increased by the creation of 2016 additional shares of £10 each, making the total nominal capital of the company £60,160, and that the directors be, and they are hereby, authorized and empowered to issue such additional shares, and also the 984 original shares in the company at present unallotted, and to credit such unallotted and additional shares with the sum of £10 as paid up thereon, upon payment by the allottees of such unallotted and additional shares of a sum being not less than £3 per share.

"That the holders of such additional and unallotted shares to be so issued shall be entitled to receive, notwithstanding anything in the articles of association to the contrary, interest at the rate of 6 per cent. per annum upon the sum of £3 in respect of each share, during the period of five years from the 1st of August next, out of the annual sum of £540 agreed to be paid by the *Great Western Railway Company.*

"That at the expiration of the said five years such shares shall be considered and treated with respect to dividend in the same manner and receive the like dividend as the original paid-up shares of £10 in this company.

"That the directors be and they are hereby authorized to offer such additional and unallotted shares to the present shareholders of the company whose shares are fully paid up, in proportion to the number of shares held by them, and afterwards to such other persons as the directors may think fit.

"That these resolutions be deemed and taken as additions to, and form part of, the articles of association of the company, and, so far as the same may be inconsistent with any of the

articles of association of the company, be deemed and taken as provisions in lieu of such article or articles."

The two extraordinary meetings were duly convened by notice sent by post to every shareholder of the company in the manner prescribed by the articles of association, a copy of the proposed resolutions being sent with the notice. The proposed resolutions were passed without any variation.

There was evidence that the first meeting was attended by sixty-seven shareholders, holding at least 413 shares, and that the resolutions were carried with the assent of all the shareholders present except one, who held twenty shares; and that the second meeting was attended by twenty-three shareholders, holding 227 shares, and the resolutions were then carried unanimously.

In accordance with the resolutions, notices offering the shares for subscription were sent by post to all the shareholders of the company, the following form of application for allotment being annexed to the notices:—

"*Weymouth and Channel Islands Steam Packet Company, Limited.*

"Be pleased to allot me preference shares in the *Weymouth and Channel Islands Steam Packet Company, Limited,* upon the terms agreed to at a special meeting of shareholders held at *Jersey*, 29th May, 1861, and I hereby undertake to pay for the same the sum of Three Pounds per share on receiving an intimation that my request has been complied with.

"Dated this day of 186 .

"Name

"Place of abode

"Occupation

To the Chairman and Directors. }„

Ultimately 1631 shares were issued, and paid for at the price of £3 per share.

The certificates of the shares thus issued at a discount were

C. A. 1890

In re WEYMOUTH AND CHANNEL ISLANDS STEAM PACKET COMPANY.

headed with the name of the company, and contained the following:—

"Original Capital, £40,000, in 4000 Shares of £10 each.
"Increased by Special Resolution, dated 10th July, 1861, to £60,160, in 6016 Shares of £10 each.
"Incorporated under the *Joint Stock Companies Act*, 1856.
"No.

"This is to certify that is the proprietor of the share No. , in the *Weymouth and Channel Islands Steam Packet Company, Limited*, subject to the rules, regulations, and orders of the said company for the time being in force."

Each certificate was sealed with the common seal of the company, and signed by the secretary.

The certificates of the shares which had been issed at par differed from this form only in this respect, that the capital of the company was in them thus described:—

"Capital, £40,000, in 4000 shares of £10 each, with power to increase."

The entries made with respect to the 1631 shares issued at a discount in the share registers and share ledgers from time to time kept by the company had not been uniform. In many of the entries the shares were stated to be paid up to the extent of £3 per share only; in others the shares were credited as fully paid up.

The statutory returns made annually by the company to the Registrar of Joint Stock Companies did not, for several years after the issue of the 1631 shares, disclose the fact that only £3 per share had been paid in respect of those shares; but the return made in 1868 and those made in subsequent years did disclose it.

The company's balance-sheets from 1862 to 1880 did not expressly shew that any shares had been issued at a discount; but in and since the year 1881 the balance-sheets had shewn that 1631 shares had been issued at £3 per share.

Except by the distinguishing numbers of the shares, no distinction had ever been made in transfers of shares between the shares issued at par and the shares issued at a discount. The

company had registered many transfers, comprising shares of both classes, and had issued certificates to transferees, comprising shares of both classes, in no way (except by number) distinguishing the shares of the one class from the shares of the other class.

At the date of the petition some of the 1631 shares issued at a discount were still held by the original allottees thereof; but a large number of those shares had been transferred from time to time.

During the term of five years referred to in the special resolutions, the holders of the shares issued at a discount received, out of moneys provided by the *Great Western Railway Company*, interest at the rate of 6 per cent. per annum on the sum of £3 per share.

After the expiration of the five years, fresh agreements were from time to time made with the *Great Western Railway Company*, under which that company paid an annual sum to the *Weymouth Company*, upon trust to divide the same as interest among the shareholders of the *Weymouth Company*, and that sum had been from time to time distributed among the shareholders, in proportion to the number of shares of either class held by them respectively, without distinction.

In 1889 the company resolved upon a voluntary winding-up under the provisions of the *Companies Acts*.

The company had no creditors. The assets had been realized, and, subject only to the costs of the liquidation, there remained a sum of about £25,000 for division among the shareholders.

The petition asked that it might be determined upon what principles, and in what shares and proportions, as between the holders of the two classes of shares, the available assets ought to be distributed.

The petition was served on shareholders appointed by the Court to represent each class of shareholders.

The petition was heard before Mr. Justice *North* on the 12th of July, 1890.

Chadwyck Healey, for the liquidator, stated the facts and submitted the question to the Court.

C. A. 1890 — *In re* Weymouth and Channel Islands Steam Packet Company.

Napier Higgins, Q.C., and *Mulligan*, for the holders of the original shares which had been fully paid up in cash :—

As between the holders of the original shares and the holders of the shares issued at a discount, the former are entitled to be treated as having paid £10 per share, and the latter must be treated as having paid only £3 per share, and the surplus assets should be divided on this footing. It is now settled that, as regards a company formed with limited liability under the *Companies Act*, 1862, it is *ultrà vires* to issue shares at a discount: *In re Almada and Tirito Company* (1); *In re New Chile Gold Mining Company* (2). The payment for shares otherwise than in cash is no doubt valid, if an agreement that they shall be so paid for is duly registered under the *Companies Act*, 1867; but that does not affect the rule that the shares must be paid for in full in some way. The principle of those cases applies equally to a company registered under the Act of 1856; and indeed sects. 175 and 176 of the Act of 1862 make that Act apply to companies registered under the Act of 1856. The scope of both Acts was to limit the liability of shareholders, on the condition that a certain limited fund—that is, the nominal amount of the shares—should be secured to the creditors. This is the substitute for an unlimited personal liability of each shareholder, and the shareholders cannot contract themselves out of this condition. The contract to issue shares at a discount was therefore void, so far as it purported to relieve the holders of the shares from the obligation of paying an additional £7 per share; but the holders of the shares cannot say that they are not members of the company. They are members, but subject to the obligation of paying up the whole £10 per share. They cannot now be treated as creditors in respect of what they have paid: *Ex parte Sandys* (3); *In re London Celluloid Company* (4). There is nothing, as there was in *Burkinshaw* v. *Nicolls* (5), to estop the company from saying, as against a transferee for value of £3 shares, that the shares were not in fact paid up in full. In order that the company may be estopped, they must have issued a certificate

(1) 38 Ch. D. 415.
(2) Ibid. 475.
(3) 42 Ch. D. 98.
(4) 39 Ch. D. 190.
(5) 3 App. Cas. 1004.

stating that the shares were fully paid up, or they must have done something equivalent to that: *In re Vulcan Ironworks Company* (1). Nothing of that kind has been done.

Ex parte Maude (2) shews the proper mode of distributing the fund. The sum of £7 per share must first be paid to the holders of the fully paid shares, and the residue must then be divided rateably according to the number of shares held by each shareholder. *Ex parte Maude* was recognised as an authority by the House of Lords in *Birch* v. *Cropper* (3). If this be not the proper mode of distribution, the fund should be divided between the two classes in the proportion of ten to three: *In re Eclipse Gold Mining Company* (4); *In re Newtownards Gas Company* (5).

Cozens-Hardy, Q.C., and *Heath*, for the holders of the shares issued at a discount:—

All the shareholders ought to stand on the same level. There are no unpaid creditors, though it is true there are no surplus profits, as there were in *Birch* v. *Cropper*. Whatever may be the rights of creditors, the Court, when it is only adjusting the rights of contributories *inter se*, should have regard to the agreement which has been made between them. If the terms on which the new shares were issued were in fact known to and assented to by all the original shareholders, it would be unjust not now to treat the two classes as on an equality. The new shareholders ought not to be placed in a position in which neither they nor the original shareholders intended that they should be. The evidence shews that every original shareholder had notice sent to him of the terms on which the new shares were to be issued, and the result is the same as if every one of them had actually assented. At any rate, as regards those shareholders who were present at the meetings and assented to the resolutions, it would be inequitable now to deviate from the conditions on which the new shareholders took their shares. In *Ex parte Maude* some shareholders had simply paid up their shares in full in anticipation of calls; there were no resolutions as in *In re Eclipse Gold Mining*

(1) W. N. (1885) p. 120.
(2) Law Rep. 6 Ch. 51.
(3) 14 App. Cas. 525, 536.
(4) Law Rep. 17 Eq. 490.
(5) 15 L. R. Ir. 51.

C. A. 1890 *In re* Weymouth and Channel Islands Steam Packet Company.

Company (1). There was nothing illegal in the agreement as between the two classes of shareholders, and in adjusting their rights the Court should give effect to it: *In re Bangor and Portmadoc Slate and Slab Company* (2). *Birch* v. *Cropper* (3) is not opposed to our argument. *In re London Celluloid Company* (4) does not apply. Though the agreement was illegal and void as against outside creditors, any creditor might have contracted with the company that the new shares should not be liable to calls for his benefit. Such a contract would be similar to the ordinary clause in policies of insurance limiting the liability of shareholders in the insuring company. The validity of such a clause is recognised by sub-sect. 6 of sect. 38 of the *Companies Act*, 1862. If a creditor could enter into such a contract, surely shareholders can do so *inter se*. For twenty-four years interest has been paid to the shareholders on the footing of this agreement; why should not the sharing of losses be governed by the same rule?

As to the position of transferees for value of the new shares, there is, no doubt, a difficulty, because there is no evidence of the circumstances under which the different transfers were made. We must admit that the form of the certificate does not of itself amount to an estoppel.

Napier Higgins, in reply:—

I admit that notice of the proposed resolutions was sent to all the shareholders; but I deny that there was any contract either between the company and the shareholders, or between the shareholders *inter se*. There was only a common mistake. It is not shewn that all the shareholders received the notices; and, if they did receive them, it is not shewn that they were all *sui juris*. The provisions of the company's articles of association as to the sending of notices by post cannot bind the shareholders in the case of an illegality.

North, J.:—

The holders of the shares issued at a discount applied for their shares and agreed to become members of the company on those

(1) Law Rep. 17 Eq. 490.
(2) Ibid. 20 Eq. 59.
(3) 14 App. Cas. 525.
(4) 39 Ch. D. 190.

terms, and they have remained on the register of members for a great many years. Having regard to the principles laid down in several cases which have been referred to in the course of the argument, it is clear that it is now too late for them to say that they are not members of the company, and that they are entitled to have their £3 per share repaid in full, on the footing of their not being shareholders at all. It is too late for them to do that. What, then, is the position in which they stand? They have agreed with the company that, in consideration of their paying £3 per share, they are to be the holders of fully paid-up shares; in other words, that, on the payment of £3 per share, the sum of £10 per share is to be taken to have been fully paid up. Beyond all question that is illegal. The point was a matter of doubt for a great many years; it had not been formally decided—in fact, there were one or two authorities tending rather the opposite way. But in the course of the last few years the matter has been entirely settled, and there is no doubt now what the law is—viz., that the issue of such shares is illegal, and cannot be supported.

We come then to this—the holders of the shares issued at a discount are shareholders, and cannot insist that their shares are fully paid up; they have paid up only £3 per share. Why, then, should they not be treated as having paid up only that sum? Mr. *Cozens-Hardy's* principal argument was this, that, although no doubt what was done was illegal as between the creditors and the contributories of the company, yet it was perfectly open to all the contributories to make such an agreement *inter se*, and that there is sufficient evidence that this was really done. If all the shareholders had been present in the same room, and had all agreed to it, there was nothing illegal in the bargain—nothing to incapacitate them from contracting to that effect; and Mr. *Hardy* says it must be taken, as between the shareholders (the creditors being got rid of), that the assent of all was actually given. Mr. *Hardy* referred to one or two cases as tending in that direction; but I do not think they go further than that. I feel great difficulty in seeing how it would be possible to say that all the shareholders were bound; and it must be remembered that I am now deciding the question as between two classes of shareholders, and not dealing with particular cases,

C. A. 1890 *In re* WEYMOUTH AND CHANNEL ISLANDS STEAM PACKET COMPANY. North, J.

or considering whether there might or might not be equities for or against particular persons. *Ex parte Maude* (1) governs the present case, and I have no choice but to follow it. That case has long been acted upon; and, moreover, it has been recently recognised by the House of Lords in *Birch* v. *Cropper* (2). It seems to me, therefore, that this £25,000 must be distributed in the way in which the surplus assets were distributed in *Ex parte Maude*—that is, after satisfying all claims for costs, &c., the remaining surplus must be applied, first, in levelling down the shares—in returning to those shareholders who have paid £10 per share the sum necessary to bring them down to the level of those who have paid only £3, and then what is left must be divided rateably amongst all the shareholders, in proportion to the number of their shares. In *Birch* v. *Cropper* there was a clear surplus of profit for division. In the present case there is no profit; on the contrary, there is a loss; and the only question is, in what proportion it is to be borne by the shareholders; and I think the case applicable to this state of things is *Ex parte Maude*, the correctness of which has been recognised in the House of Lords.

I have not said anything about *bonâ fide* transferees for value of the shares issued at a discount. I understood Mr. *Hardy* to give up that point, and to admit that no distinction could be drawn between such persons and any other holders of those shares.

By the order, as drawn up, it was declared that the assets of the company available for distribution among the contributories were to be divided upon the footing of returning to the holders of the original capital a sum sufficient to place the owners of both capitals on an equality as to the amount actually paid up on the shares of each, and then of dividing the balance in proportion to the shares.

W. L. C.

C. A. The holders of the shares issued at a discount appealed. The appeal was heard on the 15th of November, 1890.

(1) Law Rep. 6 Ch. 51. (2) 14 App. Cas. 525.

Buckley, Q.C., and *Heath*, for the Appellants:—

The case should be regarded in the light of a contract between the two classes of shareholders—the original shareholders and the discount shareholders—that, in consideration of the latter class contributing £3 per share to the capital, that class should be entitled to the same rights as the former.

[BOWEN, L.J.:—How do you say the contract was created?]

In this way. The company invited subscriptions for their new capital upon certain definite terms specified in the resolutions. All the original shareholders had an opportunity of subscribing to that new capital upon those terms, and they knew that some did so subscribe, and the company has gone on upon that footing ever since. The original shareholders are, therefore, bound by acquiescence; they must be taken to have made a distinct bargain with the discount shareholders that if the latter subscribed the £3 per share they should stand on the same footing as the former. As between the corporators such a contract or bargain is not *ultrà vires*. Suppose we were not dealing with a corporation, but with three partners, *A.*, *B.*, and *C.*, and that these partners invited *D.* to be a partner, saying: "If you will contribute £1000 to the partnership capital, we agree that you shall not be liable for the partnership debts, and also that when the partnership is wound up you shall receive your £1000 before we receive anything." As against creditors, no doubt, such an agreement would be invalid; but supposing that on the winding-up of the partnership the debts were all paid, *D.* might say, "Give me my £1000 pursuant to your agreement;" and there would be no answer. So, if the existing members of a company say to a new member who subscribes, for instance, for shares to the value of £500, "You shall have the £500 back before we take anything on our shares," that is perfectly legal, if on the company being dissolved it has no debts. An agreement to divide the surplus assets of a company is not an agreement with the company at all. If the company is dissolved it has nothing to do with the matter; it is simply a matter between individuals. The company might have been made formally a party to the contract; but it would not, if dissolved, take any part in the

C. A. 1890. *In re* WEYMOUTH AND CHANNEL ISLANDS STEAM PACKET COMPANY.

operative clause of the contract. The division is made when the company has ceased to exist. We say, therefore, it is a bargain between the individuals *inter se*, to which the company is not a party in the sense of being interested. Here the position is this: The contract with the company itself is entered into by payment of the £3 to the company; but when the company is wound up the money constitutes a pool in the hands of the liquidator as stakeholder; persons come round asserting various rights in this pool; the ten-pound shareholders say they want a share; the three-pound shareholders say, "No; you agreed we should have certain rights in priority to you."

[FRY, L.J.:—Can you cite any authority in which regard has been had to such an agreement, where it is *ultrà vires* as between the company and the contributories?]

Yes. *In re Bangor and Portmadoc Slate and Slab Company* (1) is a case in which a bargain that was illegal in a going company —that is, to return capital—was held to be legal in the liquidation. A shareholder who might originally have had a right to come for rescission of his contract cannot do so after the company has been ordered to be wound up.

We rest the agreement here upon the resolutions in 1861 for the alteration of the capital, the knowledge on the part of the original shareholders that the new shares had been offered accordingly and many subscribed for, and the long period of acquiescence by them in the company going on upon that footing.

The transferees of the discount shares are in the same position as their transferors, and are bound by the resolutions in force when they took over their shares. Should the Court hold the contract to be *ultrà vires*, then there ought to be an inquiry as to the rights of the two classes of shareholders, with a view to the discount shareholders getting back the £3 they have paid.

Napier Higgins, Q.C., and *Mulligan*, for the original shareholders, and

Chadwyck Healey, for the liquidator, were not called upon.

(1) Law Rep. 20 Eq. 59.

LINDLEY, L.J.:—

This is an appeal from an order made by Mr. Justice *North*, declaring that the assets of the company available for distribution among the contributories are to be divided upon the footing of returning to the holders of the original capital a sum sufficient to place the owners of both capitals on an equality as to the amount actually paid up on the shares of each, and then of dividing the balance in proportion to the shares; and the question is whether that is right.

This company is a limited company, formed and registered under the *Joint Stock Companies Act*, 1856, which Act, and the *Joint Stock Companies Winding-up Amendment Act*, 1857, are, for the present purposes, not materially different from the *Companies Act*, 1862, which replaced them. The company was formed with a capital of £40,000, in shares of £10 each. After it had been formed, and after certain shares had been issued, it was found desirable to obtain further money by increasing its capital; and accordingly a series of resolutions was passed to the effect that the capital should be increased, and the first of these resolutions runs in this way: [His Lordship read it, and continued:—] The sum and substance of that was that each person who paid £3 was to get a share fully paid up nominally of £10. Then there are resolutions relating to interest and dividend in respect of the new shares, which I will not further allude to. I will merely observe in passing that, upon the true construction of these resolutions, supposing the resolutions were valid, they might possibly entitle the holders of the new £10 shares to a preference, not only as regards the dividend, but also as regards the capital. I say nothing more upon the point, for it has not been much argued; but it looks as if that must be the right construction of the resolutions.

On the faith of those resolutions shares were issued and allotted; and the request to have them allotted ran in this way: [His Lordship read it, and continued:—] Certain shares were accordingly allotted to persons on requests made in that form.

The first question we have to consider is, what is the effect of that transaction—what contract was, in fact, entered into by those who took shares upon the terms of the resolutions to which

C. A. 1890 *In re* WEYMOUTH AND CHANNEL ISLANDS STEAM PACKET COMPANY. Lindley, L.J.

I have referred? I take it to be clear beyond all controversy that the contract, and the only contract, into which they entered was a contract with the company. There was no contract with the individual shareholders, as distinct from the company; such a contract was never dreamt of; and it would be contrary to principle to hold that a contract with a corporation is equivalent to a contract with the individual members of that corporation. Mr. *Buckley* felt that difficulty, and under the stress of it he was compelled to contend that a contract with a corporation might, for certain purposes at all events, be treated as a contract with individual members. That is contrary to law, and contrary to all the principles which relate to contracts with incorporated societies.

Now, regarding the matter, not as it is suggested, but as it really was, namely, a contract with the corporation, was it a legal or illegal contract? Was it *ultrà vires*, or was it not? That point, which was possibly doubtful in 1861, has been settled long since; and it has been determined that a contract by a limited company to issue shares at a discount is not binding, and that a company could, notwithstanding such a resolution as this, compel all those who took shares upon the terms of it to pay them up in full. I do not say now whether the shareholders could or could not have rescinded the contract within a proper time, if they had not allowed themselves to remain on the register as they have done. I pass that by for the moment; but, assuming they could not rescind, the contract would bind them to pay up the whole £10 a share. Now, it is on that footing that the order appealed from has been framed, and Mr. *Buckley* complains of it. He says that, although it is very true that is *ultrà vires* as between the company and the shareholders, yet we can regard it, and ought to regard it, as *intrà vires* as between the contributories of the company. Looking at it, however, in that view, it is a contract which nobody ever dreamed of entering into; and we are asked to treat that which is neither more nor less than a contract with the corporation as a contract of a totally different kind, namely, between the individual members. The answer is, there is no such contract; and that is the whole answer to Mr. *Buckley's* argument, because, as he proceeded, it was found that each step

as he went assumed as its basis that there was this contract, which exists only in his imagination. Even the last point, when he invited us to direct some inquiry as to the relative rights of the discount shareholders and of the original shareholders, is based on the same idea. There is no ground for any such inquiry, unless there be in truth some such contract as he suggested. There being none, the ground for an inquiry entirely fails.

It appears to me, therefore, that the decision appealed from is right; it is based upon well-known authorities, of which *Ex parte Maude* (1) is the leading case, and to which I need only refer by name. The appeal must be dismissed.

BOWEN, L.J.:—

I am of the same opinion. Mr. *Buckley's* whole case depended on his laying the foundation of a contract between the individuals. The answer is manifold. In the first place, as my brother *Lindley* has observed, there was no contract in fact between those individuals; secondly, the law would not, under the circumstances of the case, imply any such contract; nor would it imply a contract except under circumstances which are consistent with the hypothesis of an implied contract. Thirdly, if there was a contract as between the individuals as suggested—and suggested without reason—it can only be a contract between the individuals that each should make an illegal contract with the company—a contract with the company which is *ultrà vires* of the company. Such an agreement, if made, could not be enforced against present, and certainly would not bind future, shareholders.

FRY, L.J.:—

I am entirely of the same opinion.

Appeal dismissed, with costs.

Solicitors: *Pattison, Wigg, & King*, agents for *Andrews, Barrett, & Andrews, Weymouth; A. B. Chubb.*

(1) Law Rep. 6 Ch. 51.

G. I. F. C.

C. A.
1890
Nov. 17, 18;
Dec. 3.

In re PATRICK.
BILLS *v.* TATHAM.

[1888 P. 2466.]

Voluntary Settlement—Complete or Incomplete Assignment of Debts—Debts got in by Settlor—Liability of Settlor's Estate.

P. executed a voluntary settlement, by which he assigned certain personal property, including four debts which were due to him on the security of bills of sale, to trustees, with power to sue for the debts, upon trust to sell and convert into money the trust premises and execute and do such assurances and things as should be expedient, and to apply the proceeds for the benefit of his wife and other relatives. But he made no express assignment of the securities for the debts, nor did he give them up to the trustees. The settlor afterwards received payment of these four debts and died intestate. In an action for the administration of his estate and of the trusts of the settlement:—

Held (affirming the decision of *Kekewich*, J.), that the debts were completely assigned by the voluntary settlement, and that the trustees were entitled to prove as creditors against the estate of the intestate in respect of the debts received by him.

Whether the trustees might have sued the intestate at law for the amount received by him, *quære*.

By a voluntary settlement dated the 11th of August, 1873, and made between *J. T. A. Patrick*, therein called the settlor, of the one part, and *H. E. Tatham* and *W. E. Robinson*, as trustees of the other part, after reciting that the settlor was entitled to a leasehold house therein mentioned, and to certain mortgages on leasehold houses and other personal property, and was also entitled to the several principal sums of money specified in the schedule thereto, which were due and owing to him respectively on the securities in such schedule also specified, together with interest thereon respectively, the settlor assigned to the trustees the leasehold house and the mortgage debts and other personal property, and all those several principal sums of money specified in the schedule thereto as owing to the settlor, and all interest due or to grow due thereon respectively, and all the estate and interest of the settlor therein, together with power for the trustees and the survivors of them, and the executors or adminis-

trators of such survivor, their or his assigns, to sue and give receipts for the said mortgage and other principal sums thereinbefore assigned or any of them, and all interest thereon respectively, in the name or names of the settlor, his executors, administrators and assigns, upon the trusts therein mentioned; and the settlor also granted to the trustees the hereditaments respectively comprised in the several indentures of mortgage subject to redemption by virtue thereof respectively. And it was thereby declared that the trustees should stand possessed of all the said trust premises thereby assigned upon trust, with such consent as therein mentioned, to sell, call in, or convert into money the said trust premises, with full powers as to the mode of carrying out such sales, and for the purposes aforesaid or any of them, to execute and do all such assurances and things as should be expedient; and the trustees were thereby directed to invest the proceeds of such sale and all such sums as should be received by them under or by virtue of the settlement, and to hold the investments and securities, upon the trusts therein declared for the benefit of the settlor's wife, *Clara Patrick*, and his sister *Margaret Patrick*, and his wife's sisters, *Frances Bills* and *Mary Ann Bills*. The schedule to the indenture contained the particulars of four debts of £117, £291, £250, and £150, with the names of the debtors and the dates of four bills of sale by which they were respectively secured. But the indenture contained no express assignment to the trustees of the bills of sale or of the goods comprised therein; nor did the settlor hand over the bills of sale to the trustees, or give the debtors notice of the settlement.

The four bills of sale mentioned in the schedule were all registered under the *Bills of Sale Act*. They contained covenants for payment of the debts and interest, and provisoes that on payment of the sums of money due thereon the assignments thereby made should cease or be void. It did not appear that the settlor had ever taken possession of any of the goods comprised in the bills of sale.

J. T. A. Patrick died on the 29th of September, 1888, intestate. Before his death he had received payment of all the debts specified in the schedule to the voluntary settlement. The

C. A. 1890 *In re* PATRICK. BILLS *v.* TATHAM.

present action was brought by the intestate's widow (who was a lunatic), his two sisters-in-law, and a creditor, against the trustees and the sister of the intestate, who was his administratrix, for the administration of the estate and the execution of the trusts of the settlement.

Mr. Justice *Kekewich* held that the four debts mentioned in the schedule to the settlement were completely assigned by the settlement, and were subject to the trusts thereof. From this decision the administratrix appealed. The appeal came on for hearing on the 17th of November, 1890.

Crackanthorpe, Q.C., and *Whitaker*, for the Appellant :—

The four debts specified in the schedule to the voluntary settlement of the 11th of August, 1873, were all specialty debts secured by bills of sale; and the deed of settlement, while purporting to assign "the several principal sums of money specified in the schedule hereto as owing to the settlor, and all interest due or to grow due thereon respectively, and all the estate and interest of the settlor therein," contained no assurance whatever, either of the bills of sale or of any of the goods comprised therein; and, accordingly, so far as those debts are concerned, the assignment was incomplete and the settlement ineffectual. The bills of sale were, moreover, never handed over to the trustees of the settlement, and no notice of the assignment contained in the settlement was ever given by the trustees to the debtors.

In order that an assignment may be good in equity, the settlor must do everything in his power to make it complete: *Milroy* v. *Lord* (1). If the assignor of a secured debt does not hand over the security to the assignee, he leaves himself in a position to go the next day to the debtor and receive the debt himself, or to assign it to some one else and hand over the security to him. Again, if the assignee who has not got the security applies to the debtor for payment, the debtor may say, "I will not pay you the debt unless you give me back my security." So that the assignee could not get the money without the security, and could not get the security except with the assistance of the

(1) 4 D. F. & J. 264.

assignor or through a Court of Equity. Thus, an assignment of a secured debt without an assurance or handing over of the security is without any actual operation and invalid: *Edwards* v. *Jones* (1); *Woodford* v. *Charnley* (2); *Bizzey* v. *Flight* (3).

There is no declaration of trust in this case; the Court is always jealous of imperfect gifts, and this is a mere imperfect and inoperative voluntary assignment of certain secured debts, the securities for which the settlor retained and afterwards chose to realize, and his estate is not liable to make good the amounts he received.

Warmington, Q.C., and *E. S. Ford*, for the Respondents:—

This is a good and sufficient assignment both of the debts and of the securities. The contrary construction would give an unreasonable result, and one opposed to the intention of the settlor. The recitals of the deed refer to the securities as well as to the debts, and the operative part specially refers to the schedules which also mention the securities. Moreover, the settlor gives power to the trustees not only to sue for the debts, but to call in and convert into money the trust premises, and to execute all assurances that might be expedient. All this shews that the settlor intended to assign the securities with the debts. In *Woodford* v. *Charnley*, and *Bizzey* v. *Flight* (4), the trustees had no such powers, and *Woodford* v. *Charnley* has never been followed. In both those cases the Court held that there was no complete assignment of the debt; but here there was a complete assignment, and the trustees could have sued the debtors, and might also probably have brought an action at law against the settlor if he received the debts himself, to oblige him to make good his assignment. *Fletcher* v. *Fletcher* (5) is a distinct authority in our favour.

Swinfen Eady, for the trustees.

Crackanthorpe, in reply, referred to *Re Way's Settlement*

(1) 1 My. & Cr. 226.
(2) 28 Beav. 96.
(3) 24 W. R. 957, 958.
(4) 3 Ch. D. 269; S.C., 24 W. R. 957.
(5) 4 Hare, 67.

C. A. 1890 *In re* PATRICK. BILLS *v.* TATHAM.

Trusts (1), and *Richards* v. *Delbridge* (2), and as to the effect of the recital to *Leggott* v. *Barrett* (3).

1890. Dec. 3. LINDLEY, L.J. :—

This is an appeal from so much of an order of Mr. Justice *Kekewich* as declares that certain debts mentioned in the schedule to a voluntary deed dated the 11th of August, 1873, were assigned by it and became subject to the trusts thereof. The Appellant is the legal personal representative of the settlor, and it was stated, and not contested, that the debts in question had been got in by him after the execution of the settlement, and that the object and effect of the order appealed from was to render the settlor's estate liable to make good the amount of the debts assigned for the benefit of the persons claiming under the trusts of the settlement. This, however, is not stated in terms in the order appealed from.

The appeal raised two questions, viz. :—(1.) Whether the debts referred to were so completely assigned by the settlement that the assignees of them could have recovered them from the persons who owed them to the settlor without any further assistance from him; (2.) whether the settlor, having himself got them in, was liable to make good to the trustees of the settlement the amount received by him. The first question turns on the true construction of the settlement. [His Lordship stated the provisions of the settlement, and continued :—] The debts assigned were all specialty debts, and were all secured debts. They were secured on goods and chattels, and by registered bills of sale assigning them to the settlor. There is no evidence to shew whether the settlor ever took possession of the goods or not. The redemption clauses are to the effect that, on repayment of the money due, the bills of sale should be void. No reassignment by deed was contemplated, nor would any such reassignment be necessary. If the grantee of the goods had them, he would have to redeliver them to the grantor; but if the grantor had them, no deed and no delivery would be necessary to revest the goods in him when he paid off the debt secured upon them.

(1) 13 W. R. 149. (2) Law Rep. 18 Eq. 11. (3) 15 Ch. D. 306, 311.

The settlement must be read so as to carry out, and not to defeat, the intention of the settlor, and although the settlement does not in terms assign either the bills of sale or the goods, it directs the trustees to get in the debts, and it empowers them to do whatever is necessary for that purpose. Under these wide words the trustees could, in my opinion, put in force, either in the name of the settlor, or, if necessary, in their own name, all or any of the powers contained in the bills of sale, could do whatever might be necessary to revest the goods in their respective grantors on payment off of the moneys due on their respective securities. Indeed, if it were necessary to imply an assignment to the trustees of the bills of sale and of the goods comprised in them, I am by no means sure that it would be going too far to imply such an assignment. Be this as it may, in my opinion the settlement amounted to a complete, and not to an incomplete assignment of the debts mentioned in the schedule to it, within the principle of *Kekewich* v. *Manning* (1), which is the leading case on this subject. The fact that notice of the assignment was not given to the debtors did not render the gift incomplete. See *Fortescue* v. *Barnett* (2); *Donaldson* v. *Donaldson* (3).

If once the conclusion is arrived at that the assignment of the debts was complete, and not incomplete, it follows that the settlor, having got in the debts himself, is accountable to the trustees of the settlement for the amount he so got in. This was decided in *Fortescue* v. *Barnett*. There is no question here of following trust money, and the right of the plaintiffs is only to rank as creditors against the estate of the deceased for the amount of the debts he got in; but the order appealed from ought to be so worded as to establish this liability, and some words will be inserted to supply this omission.

Before parting with the case it will be right to say a few words with reference to *Woodford* v. *Charnley* (4), and *Bizzey* v. *Flight* (5). In those cases the assignment of the debts was held not complete. The legal estate in the land on which the debts

(1) 1 D. M. & G. 176.
(2) 3 My. & K. 36.
(3) Kay, 711.
(4) 28 Beav. 96.
(5) 24 W. R. 957.

C. A. 1890 *In re* PATRICK. BILLS *v.* TATHAM. Lindley, L.J.

were charged was not conveyed to the assignees of the debts, nor had those assignees any power of disposing of the land. No such powers were conferred on the assignees of the debts as we find in the case before us. When it becomes necessary to reconsider those cases, it will be well to do so in connection with some decisions at law, which shew that the assignor of a debt is liable to be sued at law by the assignee, if the assignor himself defeats his own assignment by getting in or releasing the debt assigned: see *Gerard* v. *Lewis* (1); *Aulton* v. *Atkins* (2). The present case was not discussed from this point of view, and I do not, therefore, pursue it. But, if the settlor could have been sued at law by the trustees of the settlement for the amount of the debts got in by him, it follows that his estate is liable in equity also for the same amount, on grounds quite distinct from those which were discussed at the Bar, and have been dealt with in the earlier part of this judgment: see *Fletcher* v. *Fletcher* (3).

The order appealed from will be made complete by adding words to the effect I have indicated; but the appeal fails, and must be dismissed with costs.

BOWEN, L.J.:—

I agree, and will only add that I desire to express no opinion as to the cases upon the question whether the settlor could have been sued at law by the trustees.

FRY, L.J.:—

I have come to the same conclusion from the construction of the instrument itself. The settlor gives authority to the trustees to sue for the debts, and then he declares a trust to sell, call in, and convert into money the said trust premises, and to execute all such assurances as shall be expedient; so that the trustees have an express power to assign the chattels on which the debts were secured. I concur with Lord Justice *Bowen* in desiring to reserve my opinion upon the question raised by the cases referred to.

Solicitors: *Shelton Crickitt; G. B. Crook; A. F. Coe.*

(1) Law Rep. 2 C. P. 305. (2) 18 C. B. 249.
(3) 4 Hare, 67. M. W.

JENKINS *v.* JACKSON.

C. A.
1890
KEKEWICH, J.
Aug. 8; *Nov.* 8.
C. A.
Dec. 10.

[1887 J. 474.]

Practice—Taxation—Apportionment of Costs.

In an action for nuisance by vibration and by offensive behaviour, judgment was given for the Defendants on so much of the statement of claim as related to offensive behaviour, and damages were given to the Plaintiff on the ground of nuisance by vibration, which was the point on which the Plaintiff mainly relied. The judgment referred it to the Taxing Master to tax the Defendants' costs of so much of the action as related to offensive behaviour and to tax the Plaintiff's costs of the rest of the action, and the Taxing Master was to set off the said costs of the Defendants against the said costs of the Plaintiff, and to certify the balance; and the Defendants were ordered to pay such balance to the Plaintiff. The Taxing Master, in taxing the bill of costs brought in by the Plaintiff, allowed him one moiety of each item which related to both the issues, and allowed him in full the items which related solely to the issue on which he had succeeded, and followed the same rule in taxing the bill brought in by the Defendants. The result was that the Plaintiff had a small balance to receive. The Plaintiff appealed from this taxation:—

Held, by *Kekewich*, J., and by the Court of Appeal, that this taxation was correct, and that though in the Queen's Bench Division this form of order would probably have been construed as giving the Plaintiff his costs of the action except so far as they had been increased by the issue on which he had failed, the settled practice in the Chancery Division was that under this form of order the general costs should be apportioned rateably between the issues.

THIS was an action commenced in April, 1887, by the lessee of two rooms on the first floor of a building in *Cardiff*, against the lessors, who had covenanted for quiet enjoyment, and against *Summers*, the lessee of another part of the building. The case alleged by the statement of claim was that the lessors had, subsequently, let a hall on the second floor of the same building, situate immediately above the Plaintiff's rooms, to the Defendant *Summers*, for the purpose of being used for dancing and musical entertainments; that the hall was used for those purposes, and latterly as often as three times a week; that the entertainments were always accompanied by great noise, and the dancing caused excessive vibration, and that thereby, and by reason of the unmannerly and offensive behaviour on the staircase

C. A. 1890 JENKINS v. JACKSON.

of the persons who frequented the entertainments, the Plaintiff could not peaceably or with reasonable comfort enjoy his rooms. The Plaintiff asked for an injunction and damages.

On the 3rd of August, 1888, Mr. Justice *Kekewich* gave judgment (1) in the action. He held, that the matters complained of were not breaches of the covenant for quiet enjoyment, and that he therefore was not bound to grant an injunction. His Lordship held, however, that there had been an actionable nuisance by noise and vibration, but, on the balance of convenience, considered it best not to grant an injunction. His Lordship further said that he should give judgment for the Defendants so far as the action complained of unmannerly and offensive behaviour on the staircase, and that the Plaintiff must pay the costs of the action to that extent. As regarded the noise and vibration, he gave the Plaintiff £20 damages, and said that "he must have the costs of the action except so far as they are before ordered to be paid by him."

In the judgment passed and entered, the costs were dealt with as follows:—

"On so much of the statement of claim as relates to unmannerly and offensive behaviour on the staircase and approaches to the Plaintiff's offices of disorderly persons collected by the Defendants' entertainments, this Court gives judgment for the Defendants; and it is ordered that it be referred to the Taxing Master to tax the costs of the Defendants of so much of this action as relates to the said unmannerly and offensive behaviour (other than their costs of the motion to postpone the trial of the action); also to tax the Plaintiff's costs of the rest of this action (including in the Plaintiff's costs the costs of the motion to postpone the trial of the action); and the Taxing Master is to set off the said costs of the Defendants against the said costs of the Plaintiff, and to certify the balance. And it is ordered that the Defendants do pay to the Plaintiff the balance of the said costs so to be certified as aforesaid."

The Taxing Master in his taxation, proceeded on the principle of apportioning the general costs of the action in moieties

(1) 40 Ch. D. 71.

between the Plaintiff and the Defendants. The Plaintiff carried in various objections, the only one which need be noticed being objections to the above principle of apportionment. The Taxing Master disallowed these objections, and in his reasons stated as follows: "I considered the objections to my allowance to the Defendants of a moiety of the general charges. I carefully considered each item, and where the items were general or related to each issue allowed a moiety; but in every case where the items related solely to one issue allowed the items in full. The same reason applies to the disallowance to the Plaintiff."

The result was, that the costs payable to the Plaintiff were taxed at £284 10*s.* 5*d.*, and those payable to the Defendants at £237, leaving a balance of £47 10*s.* 5*d.* for the Plaintiff to receive.

The Plaintiff took out a summons for the Taxing Master to review his taxation, and it was adjourned into Court to be heard before *Kekewich*, J. The summons was heard on the 8th of August, 1891.

Warmington, Q.C., and *R. J. Parker*, for the summons:—

The bulk of the costs were occasioned by the issues relating to noise and vibration, which constituted the main part of the Plaintiff's case, and on which he was successful. He failed only on a minor issue. The Taxing Master appears to have followed *Knight* v. *Purssell* (1); and if his decision is upheld, the result will be that the Plaintiff will be deprived of a large proportion of the general costs of the action. That is not fair. He ought to have the whole of the general costs of the action except so far as they have been increased by the issue in which he was not successful: *Sparrow* v. *Hill* (2).

Neville, Q.C., and *Prance*, for the Defendant:—

The costs have been taxed in accordance with the settled practice in the Chancery Division which should not be disturbed: *Knight* v. *Purssell* (3). The practice in the Queen's Bench Division is different, and therefore *Sparrow* v. *Hill* does not apply.

(1) W. N. 1879, p. 182. (2) 8 Q. B. D. 479.
(3) W. N. 1879, p. 182; 49 L. J. (Ch.) 120.

C. A. 1890

JENKINS v. JACKSON.

KEKEWICH, J., reserved judgment in order to inquire what was the practice in the Taxing Masters' office.

The Chancery Taxing Masters, in answer to a memorandum from Mr. Justice *Kekewich*, returned the following note :—

"The practice with regard to costs under orders where a party is partially successful and partially fails, is well settled in this office according to the decision in *Knight* v. *Purssell* (1).

"The Master is guided by the form of order, which, except in cases requiring special directions, is in one or other of the forms hereinafter stated.

"There are two forms of order. In one (which is the form adopted in *Jenkins* v. *Jackson*), the Plaintiff gets his costs of one issue, or as in this case of one part of his claim, and the Defendant of the other. There is nothing in the order to shew that one is more important than the other, nor has the Master any power to discriminate between them. He therefore divides the general costs in moieties, but gives to each party such part of every affidavit or document as relates to that part of the claim on which he succeeded, disallowing the rest.

"In cases where the Court considers the plaintiff or defendant entitled to more than this, the order gives him, 'the costs of the action except so far as they have been increased by the unsuccessful issue.' This gives him all the general costs; but the Master eliminates everything relating to the issue on which he failed.

"The Masters respectfully call attention to the case of *Harley* v. *Hunt* (2), which is a direct confirmation of the views above stated, and deals with *Sparrow* v. *Hill* (3).

"The Taxing Master is bound by the order, and has taxed the costs according to the settled practice, having regard to the form of order."

1890. Nov. 8. KEKEWICH, J.:—

This case was argued before the vacation, and judgment was reserved in order that I might consult the Taxing Masters,

(1) W. N. 1879, p. 182; 49 L. J. (Ch.) 120. (2) W. N. 1887, p. 184.
(3) 8 Q. B. D. 479.

which I have now done. I must decide the case according to the principle that it is far more important that law should be certain than that it should be sound—a principle which in my judgment is particularly applicable to questions of procedure and practice. The judgment which I gave on the trial of *Jenkins* v. *Jackson* (1) referred it to the Taxing Master to tax the costs of the Defendants of so much of this action as relates to the unmannerly and offensive behaviour, with a small exception; also to tax the Plaintiff's costs of the rest of this action, including in the Plaintiff's costs the costs of a motion to postpone the trial of the action (that is, the action before me), and the Taxing Master was to set off the said costs of the Defendants against the said costs of the Plaintiff, and to certify the balance. The result of the taxation was to divide the general costs of the action into moieties, the Taxing Master considering that there having been two issues, one of which was decided in favour of the Plaintiff, and the other in favour of the Defendant, that was the proper way of dealing with the general costs—that is to say, such costs as did not relate exclusively to one or other of the issues, and the question was whether he is right. After the argument I prepared a memorandum which stated the question on which I desired the Taxing Masters' assistance, and it referred to the cases which had been cited before me. One was *Knight* v. *Purssell* (2), where a division of the costs into thirds, there being three issues, had been upheld by Vice-Chancellor *Bacon*. The other case was *Sparrow* v. *Hill* (3), where the Court of Appeal reversed the judgment of the Divisional Court, and applied a different principle and did not allow division of costs into moieties or thirds, but gave the general costs of the action as a whole. The Taxing Masters have answered the question submitted to them in this way, and it is only right I should read what they say, which is not so long as my memorandum. [His Lordship read the Taxing Masters' note, and continued:—]

That is signed by the Senior Taxing Master on behalf of and for the Taxing Masters. Now the case of *Harley* v. *Hunt* (4)

(1) 40 Ch. D. 71.
(2) W. N. 1879, p. 182; 49 L. J. (Ch.) 120.
(3) 8 Q. B. D. 479.
(4) W. N. 1887, p. 184.

C. A. 1890 JENKINS v. JACKSON. Kekewich, J.

was not cited to me, nor was it in any way present to my mind. It is only reported in the *Weekly Notes* (1). That probably is the explanation of the want of reference to *Harley* v. *Hunt* here, and to its not being referred to in any way in anything which I can lay my hands upon. It was a decision in the Chancery Division—that is to say, the same division as *Knight* v. *Purssell* (2), which was before the Vice-Chancellor *Bacon*, and it is a decision of the Court of Appeal, and therefore stands side by side with the decision in *Sparrow* v. *Hill* (3). It was an appeal from the Vice-Chancellor of the Palatine Court, and there, on an order really the same as I have here to consider, the Court of Appeal upheld the view which the Taxing Masters state to be the right view according to the practice of the office. The order was in this form: "That the defendant do pay to the plaintiff his costs of this action so far as the same costs relate to the plaintiff's application for an injunction with regard to the said lift"—that is also something of the same sort of case as I had —"and let the plaintiff pay to the defendant his costs of this action incurred relative to the plaintiff's application for an injunction respecting the said area, the aforesaid costs to be taxed by the Registrar." The words are not precisely the same, and the words "the costs of the rest of the action," which occur in the order before me, do not occur there; but substantially the order is in the same form. *Cotton*, L.J., who delivered the judgment of the Court of Appeal, the other Judges, according to the *Weekly Notes*, giving judgment to the same effect, says: "It must be borne in mind that the Vice-Chancellor was a Chancery Judge, and had no jurisdiction in the Palatine Court except equity jurisdiction, and that the usual order in Chancery suits was that the costs in such a case were to be apportioned. The Vice-Chancellor had, in fact, made the order in the form usual in Chancery suits. Bearing this in mind, he could only come to the conclusion that the Judge meant that the costs should be apportioned. In *Sparrow* v. *Hill* the order was in a different form, and it was a common law action; and in that case the Court did not lay down any rule as to orders made in Chancery

(1) W. N. 1887, p. 184. (2) W. N. 1879, p. 182; 49 L. J. (Ch.) 120.
(3) 8 Q. B. D. 479.

actions"; and so they affirmed the decision of the Vice-Chancellor, and the costs were divided according to the principle which the Taxing Masters here certify to be right. That being so, whatever may have been my intentions, however I may think that the Plaintiff has not got all that he might fairly claim in the way of costs against the Defendant, I deem myself bound by that decision, and, apart from being bound, I think in the administration of justice it is only right and proper that I should adhere to what is here distinctly laid down, and follow the practice so that it may be certain; and that, whether right or wrong in itself, about which I am not at liberty to say anything, at any rate there should be no question about it in the professional mind. It follows that I must simply support the Taxing Master's certificate and refuse the application for review with costs. That disposes of the case; but I do think it is well to make one remark, and I am not sorry to be able to make it in the presence of the learned Attorney-General, who represents the profession in more ways than one. Not knowing of *Harley* v. *Hunt* (1) at all, I added this to my memorandum, which was submitted to the Taxing Masters: "It has occurred to Mr. Justice *Kekewich* that it might be useful to ascertain the practice of the Queen's Bench Division in cases of this class, and to contrast it with that of the Chancery Division. He sanctions any communication with the Masters of the Queen's Bench Division which may be deemed convenient to that end, and will give any remarks of theirs his best consideration." I quite understand that the Taxing Masters did not think it right or desirable to act on that suggestion, because the practice of their office is definite and clear, and they were able to certify, and there was no occasion for them to ascertain the practice of the Queen's Bench Division. But when I turn to *Harley* v. *Hunt* and contrast it with *Sparrow* v. *Hill* (2), and find that if this action of *Jenkins* v. *Jackson* (3) had been tried, as it very well might have been, in the Queen's Bench Division, either at the assizes or elsewhere, and the same result had followed as regards the law and the relief granted, there would have been a different system of

(1) W. N. 1887, p. 184. (2) 8 Q. B. D. 479.
(3) 40 Ch. D. 71.

C. A. 1890 JENKINS v. JACKSON. Kekewich, J.

taxation, and the order probably would have been worded somewhat differently. I cannot help thinking that it is an anomaly under the uniform practice intended to be established by the *Judicature Acts*, and that something ought to be done to reduce the rules of the two offices to one and the same basis. That, however, I have nothing more to do with than to make these extra judicial remarks, and the short result is that the application must be refused with costs.

H. L. F.

C. A.

The Plaintiff appealed from this decision. The appeal was heard on the 10th of December, 1890.

Warmington, Q.C., and *R. J. Parker*, for the appeal:—

The Taxing Master has construed the order as giving the general costs in moieties, considering that he was following *Knight* v. *Purssell* (1); but in *Harley* v. *Hunt* (2) it does not appear that this rule of division according to the number of issues was followed. This division is an unreasonable one, and is not adopted in the Queen's Bench Division: *Sparrow* v. *Hill* (3). In *Heighington* v. *Grant* (4), the apportionment was not made, as here, by charging a certain definite proportion of general costs without regard to how the costs were occasioned—the Master examined the items, and computed how much of each was properly attributable to each particular issue. If, for instance, nearly the whole of the statement of claim related to the issue on which the Plaintiff succeeded, he ought not to be allowed only half of the costs of the statement of claim. If the Taxing Master had exercised a discretion we could not have complained; but he has considered himself bound by a hard and fast rule.

Neville, Q.C., and *Prance*, for the Respondent, were not called upon.

LINDLEY, L.J.:—

I regret to say I think there has been here an error, owing to which the Plaintiff will not get all that it was intended he

(1) W. N. 1879, p. 182; 49 L. J. (Ch.) 120.
(2) W. N. 1887, p. 184.
(3) 8 Q. B. D. 479.
(4) 1 Beav. 228.

should have; but it does not follow that we can now put it right. Judging from the observations made by Mr. Justice *Kekewich*, I think that the wrong form of order has been adopted. If it was intended that the Plaintiff should have the general costs of the action, *minus* a certain portion of them, there is a well-known form of order for giving him that advantage. It is in the power of the Judge to make such order as to costs as he thinks proper, and in the Chancery Division, as in the Queen's Bench Division, if the plaintiff succeeds *primâ facie* he gets his general costs of the action, although he may fail upon some minor point. At the same time, it is for the Judge to say whether that shall be. It is perfectly competent for the Judge to depart from that course, and to apportion the costs of the action between the plaintiff and the defendant. The question is, which of the two courses has the Judge here taken? I think that what he intended to do, having regard to his observations, was to give the Plaintiff the general costs of the action, except so far as they had been increased by the issue on which he failed; but, unfortunately, the order has been drawn up in such a way that, consistently with the established practice, which I do not think we ought to disturb, it has not that operation.

The judgment in the present case first orders the Defendants to pay to the Plaintiff £20 as damages for the wrongful use of a room, which use caused a nuisance by noise and vibration, "and on so much of the statement of claim as relates to unmannerly and offensive behaviour on the staircase and approaches to the Plaintiff's offices this Court gives judgment for the Defendants, and it is ordered that it be referred to the Taxing Master to tax the costs of the Defendants of so much of this action as relates to such unmannerly and offensive behaviour; also to tax the Plaintiff's costs of the rest of this action . . . . and the Taxing Master is to set off the said costs of the Defendants against the said costs of the Plaintiff and to certify the balance; and it is ordered that the Defendants do pay to the Plaintiff the balance of the said costs so to be certified." I think there are two ways of reading those words, and I am not at all sure that a Judge of the Queen's Bench Division would not say that they give the Plaintiff the general costs of the action; in fact, I rather think

C. A. 1890 JENKINS v. JACKSON. Lindley, L. J.

that in that Division the order would be so construed. But in the Queen's Bench Division there are not those two forms of order to which I have referred as being well known in the Chancery Division. When an order in this form is taken to a Chancery Taxing Master, he says, "This is not the form which would have been adopted if the Plaintiff had been intended to have the general costs, and under an order in this form he cannot get them." That appears to me to be the established rule. It was established long before *Knight* v. *Purssell* (1), it has been followed ever since *Knight* v. *Purssell*, and it was reconsidered as lately as 1887 in the case of *Harley* v. *Hunt* (2) by the Court of Appeal. It appears to me quite impossible for us to put the present matter right by forcing upon this order a construction which would not be put upon it by those who are in the habit of dealing with it. I regret to say, I think there has been an injustice done to the Plaintiff, not through any error of the Taxing Master, but by reason of the wrong form of order having been adopted; but it is now too late to remedy this, and the appeal must be dismissed.

BOWEN, L.J.:—

I am of the same opinion. I think exactly as my learned Brother does, that here the wrong form of order has been adopted. It seems to me that the Judge really intended to give the Plaintiff the general costs of the action. That is a kind of order to which, on the Common Law side, we are more accustomed than to an order apportioning costs. Of course the Chancery Division has its own forms, which are more appropriate to the business of that Division. I also think that on the Common Law side of the Court we should probably have construed this order as giving the Plaintiff the general costs of the action; but it seems to me that in Chancery this form of order has been construed in a different way, and that the case of *Knight* v. *Purssell*, which cannot be overruled or disregarded, really settles the practice.

The only reason why I add anything to what the Lord Justice has said is this, that I have been constantly pressed for the last

(1) 49 L. J. (Ch.) 120. (2) W. N. 1887, p. 184.

twelve years during which I have been a Judge, with the difference of opinion and practice that exists as to taxations in the Chancery Division and the Queen's Bench Division, and it seems to me that nothing could be more important than that this difference should be methodically inquired into with a view to establishing a uniformity of practice in this respect between the two Divisions.

C. A. 1890 JENKINS v. JACKSON.

FRY, L.J.:—

I concur.

Solicitors: *Fielder & Sumner*, agents for *W. Jones, Cardiff; Riddell, Vaizey & Co.*

H. C. J.

In re SANDBACH AND EDMONDSON'S CONTRACT.

C. A. 1890 Oct. 30; Dec. 17.

[1890 S. 74.]

Vendor and Purchaser—Misleading Condition of Sale—Assumption of Facts on which the Root of the Title depends.

A condition of sale requiring the purchaser to assume certain facts is not misleading, if the vendor believes the facts to be true, even though the condition is intended to cover a flaw which goes to the root of the title. In such a case it is not necessary to explain in the condition the specific defect in the title which the condition is intended to cover.

THIS was an appeal from a decision of Sir *H. F. Bristowe*, Vice-Chancellor of the County Palatine Court of *Lancaster*.

The case came before the Court on a summons taken out under the *Vendor and Purchaser Act* by the vendor *Joseph Sandbach*. The facts were as follows:—

On the 18th of February, 1890, the vendor put up for sale by auction four freehold dwelling-houses in the city of *Manchester*, and *James Edmondson* became the purchaser of them at the price of £465.

Among the conditions of sale under which the purchaser bought, were the following:—

"3. The title shall commence with an indenture of settlement

C. A. 1890 — *In re* SANDBACH AND EDMONDSON'S CONTRACT.

dated the 10th of June, 1848, and made between *John Bouchier* of the first part, *Frederick Calvert* and *Michael P. Calvert* of the second part, *Robert Broome* of the third part, and *Mary Whittaker* of the fourth part.

"4. The purchasers shall assume that the said *John Bouchier* died intestate and without an heir before the year 1870."

The vendor delivered an abstract of title in accordance with the conditions of sale, from which the following facts appeared:—

By an indenture of settlement dated the 10th of June, 1848, between *John Bouchier* of the first part, *F. Calvert* and *Michael P. Calvert* of the second part, *Robert Broome* of the third part, and *Mary Whittaker* of the fourth part, *John Bouchier*, for a nominal consideration, conveyed (*inter alia*) the property in question to *Robert Broome* in fee simple in trust to pay certain expenses and certain incumbrances on the estate therein mentioned, and subject thereto to pay the yearly income to *Mary Whittaker* during her life for her separate use, and after her death in trust for the said *John Bouchier*, his heirs and assigns, and for no other trust or purpose whatever.

Robert Broome by his will dated the 25th of June, 1870, gave all his real estate to trustees in trust for his nephew, *Robert Broome*, for life with remainders over. *R. Broome*, the testator, died on the 4th of November, 1870. *Mary Whittaker* died in March, 1876. *Robert Broome*, the nephew, recently sold the property to *J. Sandbach* under the powers of the *Settled Land Act*, 1882.

The title of the vendor depended upon the death of *John Bouchier* intestate and without heirs before the death of *Robert Broome* the elder, in which event, the ultimate trusts declared by the settlement having failed, *R. Broome* would become entitled to the property in question after *M. Whittaker's* death, discharged of all trust; but the vendor was unable to prove these facts, and accordingly inserted the 4th condition of sale set forth above.

The purchaser sent in the following requisition:—

"By special condition 4 of the conditions of sale the purchaser is required to assume that *John Bouchier* died intestate and without an heir before the year 1870. It does not appear from

the conditions what estate *John Bouchier* had in the property. The only thing disclosed is that he was a party to a conveyance in 1848. He might for anything appearing in the conditions have been a trustee for the releasee under such conveyance or a conveying party who had for some reason failed to convey all his interest in the property. Under these circumstances the purchaser contends that special condition 4 does not sufficiently disclose the importance of the fact it requires him to assume, and that he is not barred by it; and he requires the vendor to furnish evidence of the death of *John Bouchier* intestate and without an heir."

To this requisition the vendor returned answer as follows:—

"The fact which the purchaser is to assume is clearly and distinctly stated in special condition 4, and the capacity which *John Bouchier* filled has nothing to do with the assumption to be made by the purchaser. The assumption is to be made with whatever legal consequences are attached thereto. The vendor, however, has reason to believe that the death of *John Bouchier* took place some time in 1851, and that there is no doubt as to his intestacy and want of an heir, and will be willing to search for proof of this at the purchaser's expense."

After some correspondence the vendor took out a summons asking, (*a*) that it might be declared that the first requisition of the purchaser had been sufficiently answered by the vendor; (*b*) that the purchaser was precluded by the 4th of the special conditions of sale from making or raising such objection or requisition; and (*c*) that a good title to the hereditaments had been shewn in accordance with the conditions of sale, and that the purchaser should pay the costs of the application.

The vendor and his solicitor made an affidavit that they believed it to be true that *J. Bouchier* died before 1870 intestate and without an heir; but that they had no proof of those facts and that the condition had been inserted in good faith.

The purchaser filed an affidavit stating that he had been informed by a Mr. *Fleeson* that he had previously contracted to buy the same property, but had on the advice of his solicitor refused to complete on account of the title, and that the vendor had

C. A. 1890

In re SANDBACH AND EDMONDSON'S CONTRACT.

requested Mr. *Fleeson* to say nothing about the title to the property.

The summons was heard by the Vice-Chancellor of the Palatine Court on the 28th of April, 1890, who made a declaration that the requisition had been sufficiently answered, and that the purchaser was precluded by the 4th condition from raising the objection, and must pay the costs of the summons.

From this order the purchaser appealed.

Haldane, Q.C., and *Bradford*, for the Appellant:—

The fourth condition on which the vendor relies is catching and misleading. The vendor concealed the fact that his whole title depended upon the death of *Bouchier* without heirs and intestate before 1870. Such a condition is not properly applicable to such a case. It only applies to a difficulty in a collateral point in the title. If it is used for the purpose of covering a blot which goes to the root of the title, the true state of the title and the legal effect of the assumption ought to be fairly disclosed. The title disclosed shews that the vendor claims under a trustee, and the onus is on him to shew how he got rid of his liability and obtained the beneficial ownership. This condition is intended to evade this duty. If the true state of the title had been explained in the condition he knew that no purchaser would bid, for a previous contract had gone off on this point of the title.

[LORD HALSBURY, L.C.:—We cannot go into any question of fraud which might avoid the contract. This is a proceeding under the *Vendor and Purchaser Act*, which binds the parties to admit the contract.]

Though the contract is binding at law a Court of Equity will not enforce such a condition: *Cruse* v. *Nowell* (1); *Rhodes* v. *Ibbetson* (2); *Symons* v. *James* (3); *Ellard* v. *Lord Llandaff* (4); *Haywood* v. *Mallalieu* (5); *Nottingham Patent Brick and Tile Company* v. *Butler* (6).

(1) 2 Jur. (N.S.) 536.
(2) 4 D. M. & G. 787.
(3) 1 Y. & C. Ch. 487.
(4) 1 Ball & B. 241.
(5) 25 Ch. D. 357.
(6) 16 Q. B. D. 778.

Cozens-Hardy, Q.C., and *Rutherford*, for the Vendor:—

There is no onus on the vendor to explain the legal effect of the assumption. If so, no condition calling upon a purchaser to make assumptions would be of any use. There is no foundation for the contention that such a condition is only applicable to collateral point in the title. All that is required is that the vendor should not know or have reason to believe, that he is asking the purchaser to admit what is not true. He must not by his condition conceal the truth or suggest a falsehood. But there is nothing of the kind here; the vendor believes that *Bouchier* died intestate and without heirs before 1870, and all the evidence he is able to procure is consistent with that. It is therefore a perfectly fair condition.

Haldane, in reply.

1890. Dec. 17. LORD HALSBURY, L.C.:—

I am of opinion that the judgment of the Court below must be affirmed.

There can be no doubt that in terms Mr. *Edmondson* is precluded by the 4th of the special conditions of sale of the hereditaments comprised in the contract from making or raising the requisition and objection upon which the question now arises if that special condition can be insisted upon by the vendor. It is argued that it cannot be insisted upon, inasmuch as it comes within the general principle that a condition is bad if it be misleading. It is not suggested here that the vendor knew that the assumption required to be made was false. Indeed, it is not suggested that the facts suggested are not true.

I should quite agree that if there were an actual misstatement or such an imperfect statement of the facts as in the result makes what is stated untrue, the condition would be so tainted by falsehood that it could not be insisted on as against the purchaser misled by such taint of falsehood. But now that the facts are all known the condition appears to have been aptly and properly framed to prevent the purchaser insisting on proof of what was then and is now believed to be the fact, but which the vendor is not in a position to establish by legal proof.

C. A.
1890
In re SANDBACH AND EDMONDSON'S CONTRACT.
Lord Halsbury, L.C.

It seems to me that although the exact defect in the proof of the title is not specifically pointed out it required very little foresight to conjecture that the death of *John Bouchier* intestate and without an heir was really material by reason of some such objection as that which is now in question.

It seems to me that an opposite view would establish the principle, that apart from intentional misleading, and apart from any knowledge by the vendor that the facts required to be assumed were not true, a condition requiring assumptions as to the title could only be supported where the specific objection to the title was pointed out. For that proposition I can find no authority, and it certainly would make every title in which there was not only defect as matter of fact, but absence of proof of soundness, absolutely unsaleable—a formidable proposition with reference to the known condition of titles to real property in this country. Possibly there could not be a better illustration of the effect of such a proposition than the present case. The vendor would have been compelled to state the exact objection with the result that no one could deal with that estate in the future.

BOWEN and FRY, L.JJ., concurred.

Solicitors: *Field, Roscoe & Co.*, agents for *J. H. Lewis, Liverpool; Rowcliffes, Rawle & Co.*

M. W.

In re MACGOWAN.
MACGOWAN *v.* MURRAY.

[1883 M. 451.]

C. A.
1890
KAY, J.
Nov. 8.
C. A.
Dec. 17, 18.

Costs—Conveyancing—Scale Fee—Negotiation of Sale by Private Contract—Contract conditional on Sanction of Court—Payment of Fee to Estate Agent—General Order under Solicitors' Remuneration Act, 1881 (44 & 45 *Vict.* c. 44), *Sched. I., Part I., r.* 11.

The solicitor to the trustees of property which was the subject of an action in the Chancery Division negotiated a sale thereof, and prepared, and procured the due signature of, a contract of sale and purchase conditional upon the sanction of the Court being given to it. In the course of the negotiation and for the purpose of obtaining evidence to induce the Court to sanction the sale, he procured the opinions of two valuers, to whom fees were paid for reporting as to the value of the property, but who took no further part in the negotiation. The contract was sanctioned by the Court without alteration:—

Held (reversing the decision of *Kay*, J.), that the solicitor had negotiated the sale within the meaning of rule 11 in Sched. I., Part I., to the General Order, and was entitled to the scale fee for negotiating a sale by private contract.

ADJOURNED SUMMONS.

This action was brought by infant beneficiaries for the administration of the estate of a testatrix, which comprised a mortgage for £6000 on certain building land.

Judgment in the action directing usual accounts and inquiries was given on the 22nd of May, 1883, and by the order made on further consideration on the 1st of August, 1885, the Defendant and *Adam Murray* were appointed new trustees of the will, and the mortgage was vested in them.

Messrs. *Darbishire, Tatham, & Worthington*, of *Manchester*, acted as solicitors for the Plaintiffs and Defendant and *Adam Murray*.

Proceedings for foreclosure of the mortgaged property were taken by the trustees, and, pending such proceedings, Mr. *Tatham*, a member of the above-named firm, entered into negotiations for the sale of the property, and on the 19th of March received from a bank an offer to purchase at the price of £5000.

C. A. 1890 *In re* MACGOWAN. MACGOWAN *v.* MURRAY.

The property had in 1883 been valued at the sum of £9332 by a firm of valuers, and *Tatham*, on receiving the above offer, obtained from them a report that the price now offered was a fair and proper one.

An order having been obtained for foreclosure absolute, *Tatham* verbally accepted the offer, subject to the preparation and completion of a formal contract in writing, and to the sanction of the Court to such contract being given in the present action. He also prepared a conditional contract which was signed on the 28th of July, 1888.

Tatham also obtained a report as to the value of the property from another firm of valuers, and affidavits in support of the application for the sanction of the Court were made by members of each of the two firms of valuers deposing that £5000 was a fair and proper price. Fees of £3 13*s.* 6*d.* and £1 1*s.* were respectively paid to the firms of valuers, and both these sums were included in the Plaintiffs' bill of costs. No further sums were paid to the valuers, nor was any other surveyor or valuer called in.

The contract was duly approved by the Court without alteration; and an order was made on the 27th of March, 1890, directing taxation of the costs of the Plaintiffs, and the Defendant and *Adam Murray*, including in the costs of the Defendant and *Adam Murray* any charges and expenses properly incurred by them in the administration of the estate beyond their costs of suit.

The solicitors included in their bill of costs, in addition to charges for obtaining the sanction of the Court to the contract, the sum of £40 as the scale fee payable to them under the General Order to the *Solicitors' Remuneration Act*, 1881, Sched. I., Part I., rule 11, for negotiating the sale of the property for £5000 by private contract.

The Taxing Master disallowed the £40, considering that the solicitors were only entitled to be paid according to Sched. II. of the General Order, as it was admitted by the solicitors that before the contract was made they consulted a firm of valuers, so that the price was not arrived at without a payment by the client to such firm. He also stated that it was not clear to his mind that when a sale or purchase had to be approved by the Court a

negotiation fee could ever be supported, as in every case a considerable sum, in addition to the negotiation fee, must be paid by the client, and this the solicitor knew before starting on the business.

The present summons was taken out by the Defendant and *Adam Murray* to review the taxation in respect of the disallowance of the fee of £40. The summons was heard before Mr. Justice *Kay* on the 8th of November, 1890.

Marten, Q.C., and *Davenport*, in support of the summons:—

The solicitor in this case "arranged" the sale, and the price and terms and conditions thereof, within the meaning of rule 11 in Sched. I., Part I., of the General Order to the *Solicitors' Remuneration Act*, 1881, and as no commission was paid by the client to an auctioneer or estate or other agent, the scale fee for negotiating is clearly payable in accordance with that rule. The Taxing Master was in error in supposing that a commission was paid to the valuers; they were merely paid the proper fees for reporting as to the value, and such a payment is entirely different from payment of commission, whether by way of a lump sum or otherwise: *Parker* v. *Blenkhorn* (1). When the conditional contract was signed the negotiation was complete; the price had then been "arranged," and all that remained was for the Court to approve or reject it. The valuers took no part in the negotiation, and had nothing whatever to do with the arrangement of the sale, or the price, terms, or conditions.

The Taxing Master has suggested that the scale fee does not apply in any case where the sanction of the Court is required; but that is contrary to *Stanford* v. *Roberts* (2), which decides that the scale fees are payable though the business is transacted in an action.

[KAY, J.:—*Stanford* v. *Roberts* was decided under a different section of the Act, and has no application. In this case everything depends on rule 11.]

In re Wilson (3) shews that the exception in rule 11 only applies where the solicitor does not himself do the work for which

(1) 14 App. Cas. 1. (2) 26 Ch. D. 155.
(3) 29 Ch. D. 790.

C. A. 1890

In re MACGOWAN. MACGOWAN *v.* MURRAY.

the remuneration is provided: here the solicitor did all the work of negotiation.

[KAY, J.:—The question is whether the word "arrange" implies a complete contract or only negotiation up to a certain point.]

Lord *Macnaghten* in *Parker* v. *Blenkhorn* (1) speaks of the preliminary stage of negotiation. "Arrangement" is something short of final settlement and determination. An arrangement may exist though the sanction of the Court is required, *ex. gr.*, in cases under the *Joint Stock Companies Arrangement Act*, 1870 (33 & 34 Vict. c. 104). In the case of an ordinary sale by a private vendor, the arrangement of the sale by the solicitor, though complete so far as he is concerned, depends for its efficacy on the approval of his client. Here we say that the solicitor arranged the sale, and the sanction of the Court was given to the arrangement which he had made.

Levett, for the Plaintiffs, was not called upon.

KAY, J.:—

I am of opinion that the Taxing Master is right in this case. The facts are these. The trustees of a property which was the subject of an action in this Court, by their solicitor, entered into negotiations to sell the property, and the solicitor managed to obtain an offer from a bank to purchase for £5000. He made an arrangement with the bank to sell the property to them for that sum, upon condition that the Court should sanction such a sale. He then obtained evidence in order to induce the Court to sanction the sale, and in the course of obtaining that evidence he procured the opinions of two skilled persons as valuers, who made affidavits to the effect that the price was fair and proper. He has been allowed the scale fee for completing the sale. That is in accordance with *Stanford* v. *Roberts* (2), which determines that the solicitor is entitled to that fee although the sale is carried out in an action. Now he seeks to be allowed the scale fee for negotiation, and also in addition the costs of obtaining the

(1) 14 App. Cas. 10. (2) 26 Ch. D. 155.

sanction of the Court to the conditional contract. If he is entitled to that it must be on the footing that the obtaining of the conditional contract entitles him to the scale fee. Looking at the language of rule 11 of Sched. I., Part I., to the General Order, I very much doubt whether the obtaining of a contract which is conditional on the sanction of the Court being given to it, would entitle the solicitor to a scale fee. But can it be said that he has arranged the price? That is another point in the case. The Taxing Master thinks that he has not arranged a price, but that the price was in fact arranged—that is, fixed and settled—by the Court which had the sanction of the matter; and also that he never did arrange a contract, because the contract was not complete and perfect until the Court had sanctioned it.

Now, if it be the law that a solicitor is not entitled to the scale fee for negotiating unless he conducts the negotiation up to a complete contract—complete in all respects, as to price, terms, and everything else—then all I can say is that this solicitor did not do that. He did conduct the negotiation up to the step of obtaining a conditional contract, but additional expense was incurred after that before the contract could be finally arranged. I have to consider what is the meaning of the word "arrange." By Sched. I., Part I., of the General Order made in pursuance of the Act of 1881, the vendor's solicitor is to be paid a certain scale fee "for negotiating a sale of property by private contract," and for deducing title, perusing and completing conveyance, &c., a certain other scale fee. Then rule 11 in the same schedule does not apply to deducing title and completing conveyance, but does apply to negotiating the sale, and the material part of that rule is as follows: "The scale for negotiating shall apply to cases where the solicitor of a vendor or purchaser arranges the sale or purchase and the price and terms and conditions thereof, and no commission is paid by the client to an auctioneer, or estate, or other agent." Taking those last words first, the meaning of them is to my mind quite plain. When the solicitor has done all the work himself without having employed an auctioneer or estate or other agent to assist him, and the work results in a complete contract, then he is entitled to the scale fee. But if he does not do all the work, if part of

C. A. 1890 *In re* MACGOWAN. MACGOWAN *v.* MURRAY. Kay, J.

the work is done by an auctioneer or estate or other agent who is paid for that assistance, then the solicitor is not entitled to the scale fee, because that part of the work is not done by him. That must be the meaning of the rule.

Now, did this solicitor arrange the sale, and the price, the terms, and the conditions of the sale? He certainly did not finally arrange them, because they were finally arranged by the Court. As I read the rule, the word "arrange" means "finally arrange," and the scale fee for negotiating applies where the solicitor himself completes the arrangement. Therefore I incline to agree with the Taxing Master that the complete arrangement of the sale never was made by the solicitor without assistance. It was made by the Court, and in order to obtain the sanction of the Court a good deal of additional expense had to be incurred. Then did he arrange the price? He negotiated with a bank for the sale of the property to the bank for £5000 if the Court approved the price. In one sense he arranged the price; but did he completely arrange it? Was there a binding contract between the vendors and the bank as the result of the negotiation? Clearly not. Until the Court accepted the price and approved the sale the contract was conditional and might fall through. If the Court had declined to approve the price, there would have been no contract at all. If the Court said that the price must be increased it is quite plain that there would have been no contract at all until the price had been increased. Therefore it seems to me that the word "arrange" in this clause of rule 11, which only applies to negotiation, means that there must be a complete negotiation resulting in a binding contract, and that the solicitor is not entitled to the fee unless he carries out the negotiation himself without paying anything to anybody else up to the time when there is a binding contract. I will illustrate the matter as I did in the course of the argument. Suppose there is a contract in this form: the vendor agrees with the purchaser to sell the property at a price to be fixed by *A. B.*, an auctioneer; and then *A. B.* is paid a commission for fixing the price. Could it possibly be said that the solicitor had arranged the price without paying commission to any one? That is the sort of case which the rule was meant

to provide for. Let me take it a little nearer. Suppose the contract had been that these trustees agreed to sell to the bank for £5000 if that price was said to be fair by *A. B.*, an auctioneer, and *A. B.* was to have a sum paid to him for his services in the matter. Could it then be said that the solicitor had arranged the price within the meaning of the rule? In my opinion it could not. It seems to me that the rule means that the solicitor shall himself, unaided, without any other person being paid for assistance, arrange the price and the other matters mentioned. I cannot say that this solicitor has done that. Therefore I think the Taxing Master was right. This case is not in the least governed by the decision in *Stanford* v. *Roberts* (1) and other cases which approved *Stanford* v. *Roberts* in the Court of Appeal, because those were not cases to which rule 11 applied at all; they were cases under the other part of the Act which relates to completing conveyance, and rule 11 does not apply to that, but only to negotiation.

C. C. M. D.

C. A.

From this decision the Defendant and *Adam Murray* appealed. The appeal came on for hearing on the 17th of December, 1890.

Sir *Horace Davey*, Q.C., and *Davenport*, for the Appellants:—

The negotiations were completed and all the terms and conditions settled by the solicitor before the contract was referred to the Court. Mr. Justice *Kay* thought that the sale was not arranged till the contract was definitely approved by the Court. But we contend that this is a mistake. The solicitor's duty ceased when the parties to the contract had agreed to the terms. The Court made no alteration in the terms. If it had refused its consent, a different question would have arisen: *Parker* v. *Blenkhorn* (2).

With respect to the fees paid to the valuers, they were not paid by way of commission, nor were the valuers acting as the agents of the vendors; but they were simply consulted as to the value of the property, and their evidence was obtained for the

(1) 26 Ch. D. 155. (2) 14 App. Cas. 1, 10.

C. A. 1890 *In re* MACGOWAN. MACGOWAN *v.* MURRAY.

purpose of informing the mind of the Court: *In re Wilson* (1); *In re Merchant Taylors' Company* (2).

Levett, for the Plaintiffs:—

The negotiations were not complete till the contract had been sanctioned by the Court: it was made conditional on that sanction being given. If the Court had refused its approval, or if it had altered the terms, the solicitor would not have been entitled to the scale fee. The arrangement cannot be said to be completed when nobody is bound; if, for instance, the acceptance is made subject to the consent of a third party. The vendor and purchaser were never *ad idem* till the Court had given its sanction. Therefore, till that had been obtained the solicitor could only claim a *quantum meruit*. If he had claimed the scale fees for all his work till the confirmation of the sale the claim would have been intelligible; but he claims the scale fees in addition to payment for his work in obtaining the sanction of the Court.

We also contend that the solicitor is excluded from the rule by having employed at his clients' expense two land agents. This was done before the contract was agreed to by the parties, and during the progress of the negotiations. It is therefore clearly within the exception in the rule.

LINDLEY, L.J.:—

This case raises a very important point upon the taxation of solicitors' bills of costs, where sales are conducted under the order or direction of the Court; everybody knows that in every case of that kind there can be no binding contract, and there never is any binding contract, until the Court has approved of it. Every sale under the direction of the Court takes this turn: there are proposals laid before the Court for its approval; if the Court does not approve, the proposals go off, or have to be modified, and if it does approve, of course there is a binding contract. The rule relating to this matter which we have to consider is to be found in Schedule I., Part I., of the General Order made under the *Solicitors' Remuneration Act*. The schedule

(1) 29 Ch. D. 790. (2) 30 Ch. D. 28.

says this in Part I., "Scale of charges on sales, purchases, and mortgages, and rules applicable thereto." Then, "vendor's solicitor, for negotiating a sale of property by private contract, 20*s.* per £100." Then, after a reference to a sale of property by public auction, there is an item for deducing title, which I only refer to for this purpose, namely, that it includes "the preparation of contract or conditions of sale," so much. Then in connection with that we have rule 11: "The scale for negotiating shall apply in cases where the solicitor of a vendor or purchaser arranges the sale or purchase and the price and terms and conditions thereof, and no commission is paid by the client to an auctioneer, or estate, or other agent."

Now the facts in this case were shortly as follows. A lady whose estate was being administered in Chancery was entitled to £6000 upon the mortgage of some property, and there was a foreclosure order made. Steps were then taken to have it sold. The solicitor to the trust had an offer from some bankers. They said they would buy it out and out for £5000. He thought that a fair price; he knew perfectly well that, even if it were a fair price, he could not effect a sale on behalf of his clients at that or any other price without obtaining the sanction of the Court; he knew he could not obtain that sanction without laying before the Court proper evidence that the price was a fair one. So what he does is this. He goes to certain gentlemen who, he knew, had valued the property some years before, and asks them whether £5000 is a fair price. They said "Yes," and he got them afterwards to make affidavits to that effect, for which he paid three guineas and a half and one guinea. He carries the case into Court, and the sale at £5000 is approved. Then he says, "Now pay me for negotiating that sale the scale charges, and pay me in addition what I have paid these two gentlemen for satisfying the Court that the proposals I have laid before the Court are fit and proper and ought to be allowed." The Taxing Master has disallowed that, and Mr. Justice *Kay* has upheld the Taxing Master's decision. The Taxing Master disallowed the claim for two reasons: "First of all," he says, "you have not negotiated the sale within the meaning of this rule; and, secondly, your clients have paid commission to an agent."

C. A. 1890 *In re* MACGOWAN. MACGOWAN *v.* MURRAY. Lindley, L.J.

Now let us see what the first proposition involves. I think I do not misunderstand the Taxing Master, who is an extremely experienced officer, when I construe his observations as amounting to an intimation of opinion upon his part that this scale fee never applies to sales under the direction of the Court. His 9th observation is this: "It is not at all clear to my mind that where the sale or purchase has to be approved by the Court that 'negotiation fee' can ever be supported, as in every such case a considerable sum, in addition to the negotiation fee, must be paid by the client, and this the solicitor knows before starting on the business." Now it appears to me there is a little confusion of thought there as to what "negotiation" means. What is a solicitor who has the conduct of the sale in Court to do? What is his business as a negotiator? I cannot understand that it is anything more than this, to obtain all the terms and all the conditions, including the cost price, which are to be laid before the Court. It is his business to negotiate that; it is not his business as negotiator to see to their performance. That is quite another matter. But when he draws up the proposals, and finally settles the proposals, which are laid before the Court for its approval, it appears to me to finish that part of the business which can properly be called "negotiation." If in the course of doing that, he charges his client, or his client pays, or has to pay—I do not attach any importance to actual payment—according to the language of the rule, any commission to an auctioneer, estate or other agent; then the scale fee is not applicable.

Now, supposing that I am right to that extent, it appears to me that this solicitor did, in the language of this rule, as the solicitor of the vendors, arrange the sale and the price, and the terms and the conditions thereof—that is to say, he brought the parties to a point, and said, "There are the terms, there is the price, and there are the conditions." That is the negotiation. Therefore, so far it appears to me he is within the rule.

Then it is said he is excluded from the second clause of this rule, "and no commission is paid by the client to an auctioneer, or an estate or other agent." That appears to me to mean necessarily this, that no commission is paid by the client, or payable—I put that word in—"to an auctioneer, estate, or other

agent," as part of the negotiation. It cannot be that no fee is to be paid, or no commission is to be paid by the client in the course of performing the conditions of the contract; that is not within the rule.

Now, what the solicitor has done is this. I take the facts in substance from Mr. *Tatham's* affidavit, which is obviously a truthful affidavit, and from what is stated in the objection, which is to the same effect. What Mr. *Tatham* says, in substance, is this: I negotiated the sale, but I knew perfectly well, in order that the approval of the Court should be obtained, that I must obtain evidence to satisfy the Court that the price was proper; and therefore I paid these fees, but not as part of the negotiation; and he says, I am entitled to the scale fees, *plus* these. I think he is right on that. Mr. *Levett* says, that in this particular case the facts are not quite in accordance with the statement I have made—he says, in fact, "You, the solicitor, went and negotiated with this surveyor, and, even if you did not pay him, you became liable to pay him as part of the negotiations." Well, the solicitor explains that. He says, I might have gone after I had got this proposal; but I did not go after that, because I knew perfectly well it would be absurd for me to go to the Court unless I had got it, and therefore I got it before instead of after. Still, the question arises, did he get the affidavits as part of the negotiations, or did he get them for the purpose of performing the condition? It appears to me that he got them for the latter purpose, and that the view taken by the solicitor is right. The appeal must be allowed.

BOWEN, L.J.:—

I am of the same opinion, and I must add my views, as we are differing from the learned Judge who decided the case.

I begin by stating that we are not now discussing the construction of the rule with regard to a case in which the sale has gone off, and what I am going to say applies to cases in which the sale has not gone off, but in which the negotiations with the agent have terminated in a successful sale.

Now, what does the rule say? The rule lays down two conditions upon which alone the scale for negotiating is to apply.

C. A. 1890 *In re* MACGOWAN. MACGOWAN *v.* MURRAY. Bowen, L.J.

The first is an affirmative or positive condition. The solicitor must have arranged the sale or purchase, and the price and the terms and conditions thereof. The second is a negative condition. He must have done that; but the client must not have paid any commission to an auctioneer, or estate or other agent. The first is affirmative. The second, which also must exist before the scale can be applied, is a negative one. Not only must the first condition have been fulfilled, but the prohibition of the second condition must not have been infringed. When the second condition says that no commission must be paid by the client, it means, I think, it must neither be paid, nor must the client be made liable in law to pay, because I think the one is really the same as the other in the eyes of the law. Where those two conditions are fulfilled the scale applies.

Now, the first observation which it seems to me to be necessary to make is, that this rule must be intended to apply to cases where the agent has only power to negotiate; it cannot be that it is only meant to be applicable in cases where the agent has power to complete the whole contract as well as to complete the negotiation. If that is so, what does the first condition mean when it says that the solicitor, before the scale applies, must arrange the sale or purchase, and the price and terms and conditions thereof? In cases where the sale is ultimately effected, the solicitor arranges the sale if he brings the negotiation to a close which leaves his principal free to accept or not, and if as a fact his principal afterwards does accept. Negotiation, I should have thought, in the ordinary meaning of the English language, is that which passes between parties or their agents in the course of or incident to the making of the contract; and if the negotiation is brought to such a close as leaves the principal at liberty to say, "I accept the offer"—then the agent has done all that a negotiating agent can do, and within the meaning of the rule he has arranged the sale, the sale afterwards being effected. Mr. *Levett* says that the arrangement is not complete if the principal has had to consult somebody else, or, if the principal chooses to consult somebody else before he consents. Really, with great respect to a most ingenious argument, it is an absurdity. The argument went to

this, that a solicitor does not arrange a sale if the principal goes down to *Brighton* to consult his wife before he accepts. Now, is that possible? But if the solicitor has nevertheless arranged completely, although the principal may take time to consult a third person, why has he not arranged because the principal has to get the sanction of the Court before he can effectuate the sale, provided that the Court in the result does consent? It seems to me that it is clear that the solicitor has arranged, if he has done all that a man can do who is appointed an agent to negotiate, and if his efforts are crowned in the end with success. If that is so, then the first branch of the definition is fulfilled. The solicitor here has arranged the sale.

Is the negative condition complied with? Has any commission been paid by the client to an auctioneer or estate or other agent? The answer seems to me to be clear, that no commission has been paid at all to anybody. A commission means a payment on a particular scale paid to an agent for agency work; but this fee has not been paid by the solicitor on behalf of the client to anybody as an agent—it was paid to obtain the expert evidence of a witness. That is really what it was intended for. However you characterise it, the last words, it seems to me, in which you can properly characterise it are as commission paid to an auctioneer or estate or other agent.

The learned Judge put a construction upon this rule which would exclude, it seems to me, from the operation of it, a vast amount of business which the rule must have been intended to cover. It certainly covers, to my mind, cases in which the agent is appointed as agent to negotiate only, and I think it certainly ought to cover cases in which sales are effected under the sanction of the Court. The learned Judge says: "'Arrange,' I think, in this rule 11, which only applies to negotiations, means that the negotiations must be quite complete and resulting in a binding contract." If he means by that that the solicitor cannot get the fee when he is only an agent to negotiate, whether his negotiation is or is not adopted by his principal, it seems to me that it makes the rule inapplicable to a vast mass of business; and if he means that the negotiation must result in a binding contract by the principal without any necessity for the

C. A. 1890

In re MACGOWAN. MACGOWAN v. MURRAY.

sanction of the Court, I do not myself see any valid reason for the distinction.

FRY, L.J.:—

I will endeavour with what brevity I can to express my concurrence in the opinion of my learned Brethren. We are concerned with interpreting a rule which decides under what circumstances the vendor's solicitor is to be entitled to a fee for negotiating a sale of property by private contract. Now, it appears to me that there is no better ascertained distinction than that which exists between negotiations for a contract and the contract itself, and that the negotiations continue up to the point when the consent of the consenting party is given. They cease there. Now the cases to which the rule is to be applied are defined in these words: "The scale fee for negotiating shall apply in cases where the solicitor of a vendor or purchaser arranges the sale or purchase, and the price and terms and conditions thereof." According to my view of the facts of this case, the solicitor did in fact arrange the sale, the price, the terms, and the conditions. He had an interview with the bank manager, who, he found, was willing to give a sum of £5000. He then settled the terms with the bank manager or their solicitor. He arranged with them the terms and conditions of the contract, and then presented it in that form to the Court. I think, therefore, in point of fact he did arrange all the things that were there mentioned.

Now, it was said by the learned Judge that in such a case as this the solicitor does not arrange, but that the Court arranges. We are not dealing with a case in which the Court has refused to accede to or approve of the terms which had been settled by the solicitor. It may be that there are cases in which it might be truly said that the Judge in Chambers has arranged the terms or the conditions of sale. About those cases I say nothing. Nothing of the kind occurs in the present instance. So far as we have heard, the contract, as settled by Mr. *Tatham*, in conjunction with the solicitors of the bank, was adopted and approved by the Court. Therefore, I think the affirmative words are amply satisfied in this case.

The second inquiry is this: Has any commission been paid,

C. A. 1890 *In re* MACGOWAN. MACGOWAN *v.* MURRAY. Fry, L.J.

or, I may say, is any commission payable by the client to an auctioneer or to an estate or other agent? The auctioneer is out of the question. The only thing that can be said is that two fees, one of three and a half guineas and the other of one guinea, were paid to two gentlemen, who, I suppose, may be described as estate agents. They are called valuers, and, no doubt, carry on business as estate agents. They were not employed in this case as agents, and, therefore, they could earn no commission; and, therefore, no commission was either paid or payable to them. What was paid to them, or is payable to them, are fees in the one case for inspecting and making an affidavit as to the value of the property, and in the other for making an affidavit with regard to the value of the property without inspecting. They are not commissions. I think the solicitor, therefore, has brought his case within the very terms and within the meaning and spirit of this rule, and, therefore, this appeal must be allowed.

Solicitors: *Cunliffes & Davenport*, for *Darbishire, Tatham, & Worthington, Manchester; Bower, Cotton, & Bower.*

M. W.

C. A. 1890 Oct. 28, 29; Dec. 17.

In re JOHANNESBURG HOTEL COMPANY. *Ex parte* ZOUTPANSBERG PROSPECTING COMPANY.

Contributory — Paid-up Shares — Payment — Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25 [*Revised Ed. Statutes, vol. xv., p.* 159].

In order that a transaction between a company and an allottee of shares may amount to a "payment in cash" of the amount payable on the shares within sect. 25 of the *Companies Act*, 1867, each party must have an actual demand on the other for present payment.

If a creditor of the company agrees to accept payment of his debt in fully paid-up shares, and shares purporting to be fully paid up are allotted to him, which he accepts, and after an order for winding up the company it is discovered that the shares are not fully paid up, the shares cannot be treated as having been fully paid up, on the principle of *Spargo's Case* (1), since a contract to take fully paid-up shares does not create a liability to pay money, and there are, therefore, no cross debts between the company and the allottee.

THE *Zoutpansberg Prospecting Company* was registered in April, 1889, as a limited company, for the purpose of exploring mines

(1) Law Rep. 8 Ch. 407.

C. A. 1890

In re JOHANNESBURG HOTEL COMPANY. *Ex parte* ZOUTPANSBERG PROSPECTING COMPANY.

and lands in the *Transvaal*, and for promoting and forming other companies. At the time of the transactions to which the present case relates, the only directors were *Durnford*, *Stephenson*, and *Pritchard*.

By an agreement dated the 25th of September, 1889, between *Charles Tyler*, of the one part, and *E. B. Phelps*, as trustee for and on behalf of the *Johannesburg Hotel Company, Limited*, of the other part, reciting that *Tyler* had been engaged in promoting a company, to be called the *Johannesburg Hotel Company, Limited*, having a capital of £75,000 divided into £1 shares, and had expended considerable time and labour in the same, and had provided the money required up to that time for such promotion, and that the promotion of the company could not proceed further except upon the terms of *Tyler* paying the fees and stamps for the registration of the company, and all the preliminary, legal, and other expenses in connection with the formation thereof, and that he was willing to proceed with the promotion upon the terms thereinafter mentioned, it was agreed between the parties (1.) that *Tyler* should provide for all expenses incident to the promoting and formation of the company down to the first allotment of shares, and indemnify *Phelps* against them; (2.) *Phelps*, as such trustee as aforesaid, agreed with *Tyler* that the directors should as soon as possible proceed to allot the shares, and immediately after such allotment should pay to *Tyler* £3750 in cash; (6.) that in case of no allotment being made within six months, the agreement should be void.

The *Johannesburg Company* was, in fact, promoted by the *Zoutpansberg Prospecting Company*, *Durnford* and *Stephenson* personally taking the principal part in the promotion.

The *Johannesburg Company* was registered on the same 25th of September, 1889, and among the objects specified in its memorandum of association was to pay out of the capital of the company all costs, charges, and expenses incurred in its formation and the subscription of its capital, and to adopt and carry into effect the above agreement between *Tyler* and *Phelps*. The 66th article provided that the first directors should be named by a majority of the subscribers to the memorandum of association, who should have power to name any of themselves, and until

such directors had been appointed the subscribers should be deemed to be, and have power to act as, the directors.

At a meeting of signatories of the memorandum of association, held on the 26th of September, 1889, at which *Durnford*, *Stephenson*, and two others were present, it was resolved that the prospectus should be approved and published, and that the agreement between *Tyler* and *Phelps*, dated the 25th of September, 1889, "be adopted."

At another meeting, on the 1st of October, at which also *Durnford*, *Stephenson*, and two others were present, it was resolved that the agreement of the 25th of September, 1889, "be adopted and confirmed." Six directors, of whom *Durnford* and *Stephenson* were two, were appointed; an allotment of shares was made, and it was resolved that £1250 should be paid to *Tyler* on account. Some part of this was paid to *Tyler* by cheque, and bills were given for the rest. He handed over to the prospecting company the cheque and bills.

The terms on which shares were to be issued were that 1*s.* per share should be paid on application, 4*s.* more on allotment, and that the rest should be called up by calls of not more than 5*s.* per share, and not at less intervals than one month.

Shortly after this an understanding was come to that the prospecting company should take £2500, the residue of the £3750, after the above payments, in fully paid-up shares instead of cash.

Durnford and *Stephenson* by affidavit stated as follows: "The amount remaining due to the prospecting company under the agreement of the 25th of September, 1889, after these payments, was £2500, and it was agreed by us and our co-directors of the hotel company that, as the hotel company was not in a position to pay the amount with facility, 2500 fully paid ordinary shares of £1 each in the hotel company should be accepted by the prospecting company in lieu of the said balance of £2500, and that prior to the issue of such shares a proper contract should be entered into and registered at *Somerset House*, in accordance with the 25th section of the *Companies Act*, 1867, and instructions were given to the solicitors of the hotel company to see this done; but by a misunderstanding the said agreement of the

C. A. 1890

In re JOHANNESBURG HOTEL COMPANY.

Ex parte ZOUTPANSBERG PROSPECTING COMPANY.

25th of September, 1889, was registered by the said solicitor in lieu of the said intended contract. On being informed that the contract was registered at *Somerset House*, it was resolved by the directors of the hotel company, at a meeting held on the 8th of October, 1889, 'That 2500 fully paid ordinary shares be allotted to the *Zoutpansberg Prospecting Company, Limited*, in terms of the agreement.' The agreement referred to here was the said intended contract, which the directors were under the impression had been registered. The matter was never brought by us before the other directors of the prospecting company. We were directors of both companies, and the secretary was also the secretary of the two companies; but the other directors of the prospecting company, to the best of our knowledge and belief, had no notice of any allotment of shares to the prospecting company by the hotel company."

Pritchard also deposed that the business was never formally brought before the board of the prospecting company, which was never asked to sanction the acceptance of the shares.

No notice of the contract of the 25th of September appeared on the minute-book of the prospecting company.

Stephenson, on oral examination, deposed as follows: "The understanding that the prospecting company should take £2500 in shares instead of cash was not in writing. It was come to immediately the hotel company proceeded to the first allotment. The understanding was come to in this way: *Durnford* and I formed a quorum of the board of the prospecting company. He proposed the arrangement to take shares instead of cash, and I assented. I presume *Pritchard* was consulted."

On the 8th of October, 1889, a board meeting of the directors of the *Johannesburg Company* was held, at which, as stated in the above affidavit, 2500 fully paid ordinary shares were allotted to the prospecting company, and a letter of allotment was sent. The prospecting company were entered on the register of shareholders, but no share certificates were ever issued to them.

On the 21st of October a board meeting of the prospecting company was held, at which a dividend of 20 per cent. was declared. *Stephenson*, on cross-examination, stated that the directors fully considered the assets of the prospecting company

before declaring the dividend, and took into account the 2500 shares of the *Johannesburg Company* as part of the assets. *Durnford*, on his cross-examination, said that the dividend was declared on the strength of the profits made out of the *Johannesburg Company*, and that the shares were taken into account in declaring the dividend. He said that *Pritchard* was present at the meeting of the 21st of October, and "would doubtless know of the agreement to take 2500 shares instead of cash." He explained the statement in the affidavit as to the matter never having been brought before the other directors, by saying that it had never been brought before them officially at a board meeting.

An order having been made on the 23rd of November, 1889, for winding up the *Johannesburg Company*, Mr. Justice *Chitty* decided that the prospecting company must be placed on the list of contributories for 2500 shares not fully paid up. The prospecting company appealed.

Dunham, for the Appellants :—

There was a binding agreement on the 26th of September, 1889, between the Appellant company and the hotel company, that the hotel company should pay the Appellant company £3750 upon the first allotment of shares. This was not a mere attempted ratification of the agreement between the Appellants and the promoters of the hotel company : it was a new contract made between the two companies. It was made by a resolution passed by the hotel company and agreed to by the Appellant company ; and, although there was no formal acceptance entered on the minutes of the Appellant company, yet it was binding upon them, because the same persons were directors of both companies and acted in both capacities. Then there was a second contract between the two companies, that the Appellant company should accept paid-up shares to the value of £2500 in part payment of the debt. This was intended to be registered under the 25th section of the Act of 1867, but by mistake it was not registered. But the first contract created a present debt from the hotel company to the prospecting company, and when the shares, to the amount of £2500, were allotted to them,

C. A. 1890 *In re* Johannesburg Hotel Company. *Ex parte* Zoutpansberg Prospecting Company.

they had a right to set off the liability for the calls against that debt. It is not necessary that the shares should be paid up actually in cash to satisfy the 25th section of the Act of 1867. It is sufficient if there is such an equivalent as would support a plea of payment in action at law: *Spargo's Case* (1); *In re Jones, Lloyd & Co.* (2); *Ferrao's Case* (3). In the present case both debts were *debita in præsenti*, although the calls were not payable till made, and the company had power to agree that the shares should be paid up at once. There was an agreement to appropriate a present debt in payment up of the shares at the time they were issued. In *Ferrao's Case* shares were allotted on terms of future payment; the company then, in part satisfaction of the claim of a creditor at the creditor's request, credited the shareholder with a lump sum sufficient to pay all future calls, and this was held to be payment up of the shares in full. *Kent's Case* (4), therefore, does not establish that there must be a present debt on both sides, and it was held in *In re Jones, Lloyd & Co.*, that this is not a necessary condition. But, suppose it were, the terms of the allotment made the calls a present debt from the allottee, and the shares, even if they were accepted, must be treated as fully paid up.

Romer, Q.C., and *Borthwick*, for the liquidator:—

[Fry, L.J.:—Suppose a man applies to a company for fully paid-up shares, and the company "accepts your offer for fully paid-up shares," can he be bound to take any but shares effectually paid up?]

We do not say that he can; but if shares are allotted to him, the allotment communicated to him, and he does not repudiate it, he is a contributory, though the shares are not fully paid up: *Andress's Case* (5). The cases are summed up in *Buckley* on Joint Stock Companies (6). The prospecting company undoubtedly accepted these shares, for they appear to have done no business except promoting the *Johannesburg Company*, and the dividend they declared could not have been declared on

(1) Law Rep. 8 Ch. 407.
(2) 41 Ch. D. 159.
(3) Law Rep. 9 Ch. 355.
(4) 39 Ch. D. 259.
(5) 8 Ch. D. 126.
(6) 5th Ed., p. 529.

any other ground than that these shares were their assets, and there is distinct evidence that these shares were taken into account as assets when they declared it.

[Lord Halsbury, L.C., referred to *Arnot's Case* (1), and *Ex parte Sandys* (2).]

As to whether the shares can be treated as paid for in cash, we say that there was no debt due from the *Johannesburg Company* to the prospecting company. An agreement was entered into, before the *Johannesburg Company* was registered, that £3750 should, on allotment, be paid to the prospecting company. That the *Johannesburg Company* ratified that agreement is not enough: *In re Northumberland Avenue Hotel Company* (3), a new contract is necessary, and there is not enough here to make one.

[Fry, L.J.:—Is there any case where a resolution "adopting" a contract has been held not to be enough?]

Possibly not; but the distinction between ratifying and adopting is very thin. By article 66 the subscribers to the memorandum may act as directors till directors are appointed; under this the subscribers must all join in any act.

[The Court intimated an opinion that the subscribers were put by the article on the same footing as directors, and that a majority could act.]

A resolution entering into a contract of this nature would be void; for there was no consideration to the *Johannesburg Company*.

[Bowen, L.J.:—Is there any case where a contract by a company to pay money to promoters, merely because they were promoters, has been enforced?]

We are not aware of any case in which it has been enforced, though payments made by directors in consequence of it have been allowed them. *In re Empress Engineering Company* (4) goes very far towards establishing that such a claim cannot be enforced; and on principle it is difficult to say why it should, for there is no consideration given to the company which was not in

(1) 36 Ch. D. 702, 714.
(2) 42 Ch. D. 98.
(3) 33 Ch. D. 16.
(4) 16 Ch. D. 125.

C. A. 1890 *In re* Johannesburg Hotel Company. *Ex parte* Zoutpansberg Prospecting Company.

existence when the agreement was made. Again—was there any agreement that shares should be allotted as ordinary shares, and a debt due from the *Johannesburg Company* applied in payment of the calls on them? Now, first of all, there could be no debt payable by the *Johannesburg Company* at the time of allotment, for, by the agreement, no promotion-money was payable till allotment. But further, we say the agreement was not to allot ordinary shares and to treat them as paid by means of a debt, but to allot them as fully paid-up shares on which there was nothing to pay, and that this was the real bargain is shewn by the attempt to have an agreement registered: *White's Case* (1).

[Fry, L.J., referred to *Ferrao's Case* (2).]

That case is not applicable. There was no question there as to the footing on which the shares were issued. In *Kent's Case* (3) the necessity of the debts being payable *in præsenti* is insisted upon. Here there never was a debt. There never was any agreement by the *Johannesburg Company* to pay £3750, though they may have agreed to pay £1250 and give 2500 shares. The £1250 they paid, and an agreement to give 2500 shares is quite a different thing from an agreement to pay £2500.

Dunham, in reply:—

As to the satisfaction of future calls by a payment *in præsenti*, *Ferrao's Case* and *Ex parte Bentley* (4) make out our case.

1890. Dec. 17. Lord Halsbury, L.C.:—

The policy of the Act of 1867 appears to me to have been that the capital of the companies to which that Act applies should be real, and that payments from the shareholders which were to form the capital should not be satisfied by arrangements like that in *Pellatt's Case* (5), or *Elkington's Case* (6), decided in the earlier part of that same year (1867).

The language of the statute is simple enough: "Every share

(1) 12 Ch. D. 511, 517.
(2) Law Rep. 9 Ch. 355.
(3) 39 Ch. D. 259.
(4) 12 Ch. D. 850.
(5) Law Rep. 2 Ch. 527.
(6) Ibid. 511.

in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash," unless a written contract to be filed before the issue of the shares shall otherwise determine.

The policy and the language are equally clear. Subject to the exception in the case where a contract is filed with the registrar of joint stock companies, which contract everybody is entitled to inspect, the shares are to be paid for, and paid for in cash; so that, I think, the Legislature contemplated that the money should actually be received on behalf of the company, and that those who received it should be accountable to the incorporated body for the money so received.

It is obvious, I think, what security that was intended to give both to shareholders and creditors, and if it were honestly acted on, security would be given that the capital of the new trading concern should really and truly be subscribed. Experience had shewn what indirect and dangerous arrangements might be made whereby a person might appear to be a shareholder and yet have never contributed one farthing to the concern. The statute, as it seems to me, intended by express language to render impossible any such indirect settlements of the right of the incorporated body to have the money, and provided that the shares should not only be paid, but added the words "in cash." Had the course of decision always followed the language of the statute no difficulty would have arisen. But a case to which I will presently refer has, I think, unfortunately established that payment in cash need not be what the words literally signify; but that if there is something which the parties choose to call payment, and if there is that which the Court can consider equivalent to cash, the language of the statute is satisfied.

In this case it is difficult to speak of the adventures which are in question as real companies. Two gentlemen appear to have got up both companies in different characters, and, having gone through the legal forms to establish two companies, and themselves acting as directors of both companies, proceed to enter into contracts binding each of them in a way which would be ludicrous if it did not involve loss and damage to persons who knew little or nothing of the real nature of the machinery by

C. A.
1890
In re JOHANNESBURG HOTEL COMPANY.
Ex parte ZOUTPANSBERG PROSPECTING COMPANY.
Lord Halsbury, L.C.

which these companies were being established. The prospecting company promote the hotel company, and the hotel company agree to pay £3750 for promoting it, and for an agreement of indemnity against all liability in respect of the formation of the company up to the date of allotment. Before the existence of the hotel company two persons named *Tyler* and *Phelps* executed a written contract which upon the formation of the company was adopted and confirmed by the two gentlemen who really were the only active persons in either company, but in the name of all the persons who signed the memorandum of association, and it may be assumed that, if in the name of the prospecting company these persons did in fact agree to the alleged contract thus adopted by the hotel company, that contract, whatever its results may be, bound the prospecting company. But I am unable to see any evidence of any such agreement. It was boldly argued that the identity of the two gentlemen in question was sufficient to establish the contractual assent of the prospecting company. It may be (indeed, it certainly is so) that the companies were but nominees—puppets—only intended to move as their manufacturers intended they should move, and had they by resolution passed under such circumstances as to bind the company for which they were then professing to act, I do not deny that the abstraction would be bound by formal acts, however unreal might be the separate identity of each company. But persons who engage in such transactions must at least make their puppets move in a legal manner. The knowledge of and intention of the individual persons is nothing to the purpose. It is the abstraction, the ideal legal personage, which is sought to be bound. Its whole nature is artificial, and it can only be bound by such acts as it, in its abstract form, consents to be bound by. I cannot affirm that the prospecting company ever accepted the terms of the contract which the hotel company adopted and were willing to agree to. Neither resolution nor minute purporting to be that of the prospecting company can be found which, as against the prospecting company, could be relied on as agreeing to the proffered terms.

Now, what was intended to be done by what I have described as the puppets was, to get rid of the payment of the shares allotted

to the prospecting company by registering a contract in writing within the 25th section. Either from a blunder or for some reason which at present I am not able to follow, the contract which might or might not have effected that object was not registered, and the result was that 2500 shares in the hotel company were allotted to the prospecting company without the protection from payment for them which the parties probably intended. That the prospecting company, therefore, are shareholders, that they are not protected by any agreement within the 25th section, are facts about which there can be no dispute, and the only mode by which the prospecting company can effectually relieve themselves from the obligation for payment on these 2500 shares is by shewing that they have paid for the shares of which they are the registered holders. This is an issue which it lies on the prospecting company to prove; and although Lord Justice *James* and Lord Justice *Mellish* have both held in *Spargo's Case* (1) (an authority by which sitting in this Court I am bound, whatever I might be elsewhere), that what would be proof of payment as distinguished from set-off or accord and satisfaction would satisfy the language of the statute, I am unable to see that upon the facts I have pointed out there would be any evidence to go to a jury of payment as distinguished from accord and satisfaction in this case. I venture to doubt whether what is described by those eminent judges as the absurdity of handing money backwards and forwards when two people have cross demands is so great as the absurdity of construing the words "payment in cash" as payment without cash. However, as I have said, I am bound by the decision in this Court; but I am of opinion that it was for the Appellants to satisfy us that there were such cross demands each upon the other, and that at the date each had an actual demand upon the other for present payment, to bring it within the decision in *Spargo's Case*. I am of opinion that they have wholly failed to establish that proposition, and I think, therefore, that this appeal should be dismissed with costs.

BOWEN, L.J.:—

I am of the same opinion.

(1) Law Rep. 8 Ch. 407.

C. A. 1890 *In re* JOHANNESBURG HOTEL COMPANY. *Ex parte* ZOUTPANSBERG PROSPECTING COMPANY.

FRY, L.J.:—

The judgment I am about to read was written before I had the opportunity of reading that just delivered by the Lord Chancellor, and I read it now, not as differing in any way from what has been said by him, but only because it deals more in detail with certain parts of the case.

In this case 2500 shares in the hotel company were allotted to the prospecting company, and it has not been denied by the Appellants, the prospecting company, that they agreed to take these shares, if not as fully paid up, then as ordinary shares. The Appellants contend that these shares have been fully paid up in cash within the meaning of the 25th section of the *Companies Act*, 1867, as expounded by *Spargo's Case* (1) and other cases, by which the words "in cash" have, in effect, been struck out of the statute. The Respondents deny that any such payment has been made. In order that the Appellant company should succeed, they must shew the existence on the 8th of October, 1889, the day when the payment is alleged to have been made, of two contracts, each creating a debt, and of an agreement between the two companies to extinguish one debt by the satisfaction of the other.

The first contract which the Appellants assert to have existed on that day is an agreement by the hotel company to pay £3750 to the prospecting company in consideration of work and labour done by the prospecting company in promoting the hotel company, and of an agreement by the prospecting company to indemnify the hotel company against all liability in respect of the formation of the company up to the date of allotment. On the 25th of September, 1889, a written contract to a like effect had been entered into between one *Tyler* and one *Phelps*, described as a trustee for the hotel company, in which *Tyler* and *Phelps* contracted as individuals. This contract was made before the hotel company was in existence; but after it came into existence, namely, on the 1st of October, a resolution was passed by the signatories of the memorandum of association adopting and confirming this agreement. It was argued that this resolution amounted to the proposal by the hotel company to enter

(1) Law Rep. 8 Ch. 407.

into a new contract with the prospecting company on terms similar to those of the contract between *Tyler* and *Phelps*. Assuming this to be correct, it remains to inquire whether this proposal was accepted by the prospecting company before the 8th of October. There is nothing to shew that this resolution was communicated to the prospecting company, or that they in any way accepted the obligation to indemnify the hotel company which *Phelps* had entered into in his own name and in terms on his own behalf.

Certain sums of money and bills were on and after the 1st of October paid by the hotel company to *Tyler*, and those are proved to have found their way to the prospecting company, but whether before or after the 8th of October is not shewn. The receipt of these payments cannot, therefore, be relied on as evidence of the prospecting company having entered into the contract at the crucial date.

The minute-book of the prospecting company contains no minute with reference to this contract, and I think that the true result of the evidence, especially that of *Pritchard*, is that this contract was never even discussed or considered at any meeting of the directors of the prospecting company.

The second contract, on which the Appellants rely as existing on the 8th of October, is an agreement by the prospecting company to take 2500 shares in the hotel company. No resolution of the prospecting company agreeing to apply for or take these shares exists; no application for them was made in the name of the company; and though what took place after the 8th of October seems sufficiently to justify the proposition (which was not disputed by the Appellants' counsel), that the prospecting company agreed to take, or ratified the taking, of these shares; yet there is nothing, in my judgment, to shew the existence of the agreement on the 8th of October.

Unless the contract by the hotel company to pay £3750 to the prospecting company, and the contract by the prospecting company to take 2500 shares in the hotel company, were both subsisting contracts and binding on the two companies on the 8th of October, there were not debts on each side which could be extinguished by cross-payments. It was for the Appellant

C. A. 1890

In re JOHANNESBURG HOTEL COMPANY.

Ex parte ZOUTPANSBERG PROSPECTING COMPANY.

FRY, L.J.

company to establish these contracts beyond reasonable doubt. That they have failed to do, and the appeal must, therefore, fail.

But, even if the two contracts were established in point of fact, there appears a conclusive reason why no payment in the manner contended for could have been made. A contract to take shares not paid up creates a liability to pay money, and under some circumstances a debt; a contract to take fully paid-up shares creates a liability to take the shares, but no liability to pay money, and no debt under any circumstances. From which it follows that there never can be any cross debts between the company and its allottee under a contract to take fully paid-up shares; and, consequently, no payment can be effected by accepting the extinction of one debt as the satisfaction of the other.

I agree that the appeal must be dismissed with costs.

Solicitors for Appellants: *Watson & Watson.*
Solicitors for Respondents: *Blunt & Lawford.*

H. C. J.

KAY, J.
1890
Oct. 31.

MAKINS *v.* PERCY IBOTSON & SONS.

[1890 M. 3035.]

Company—Debenture-holder—Receiver and Manager—Motion—Realization of Assets—Jurisdiction—Form of Order.

By the articles of association of a limited company the management of the business and the control of the company were vested in the directors. Under a power in the memorandum of association the company issued debentures purporting to charge all the company's property both present and future, including its uncalled capital.

Upon a motion by the Plaintiff, who was the only debenture-holder, in an action by him against the company to enforce his securities,

Kay, J., following *Peek* v. *Trinsmaran Iron Company* (1), but with great hesitation, appointed the managing director of the company receiver of its property and also manager of its business pending realization, with a view to enabling the company's business to be sold as a going concern; the Plaintiff undertaking to provide a sum for wages and current expenses, and also to be answerable for the receipts of the receiver and manager pending his giving security, and to procure the realization of the property as soon as possible.

THE Defendant company, *Percy Ibotson & Sons, Limited*, was registered in April, 1887, under the *Companies Acts*, 1862 to 1886, for the purpose of taking over, acquiring, and working the business of a paper and leather board manufacturer, its nominal capital being £20,000 in £1 shares. One of the objects of the company was stated in the memorandum of association to be, "To borrow upon mortgage, or raise money in such other manner as the company shall think fit, and in particular by the issue of debentures charged upon all or any of the company's property (both present and future), including its uncalled capital." By the articles of association the management of the business and the control of the company were vested in the directors.

The company duly commenced business, and a considerable portion of its share capital was issued and fully paid up.

In 1887, 1888, 1889, and 1890 the company borrowed sums amounting altogether to £12,000, with interest at 5 per cent. per

(1) 2 Ch. D. 115.

KAY, J
1890
MAKINS
v.
PERCY
IBOTSON &
SONS.

annum, from the Plaintiff, *William Thomas Makins*, one of the first directors, on the security of "mortgage debentures," for various amounts. Each debenture was under the company's seal, and thereby the company charged with the payment of the principal sum and interest "all its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being." And it was expressed to be issued subject to the conditions thereon indorsed, one of which was that the principal moneys secured should immediately become payable if the company made default for six months in payment of interest, and the holder of the debenture, before such interest was paid, by notice in writing to the company called in the principal moneys, or if an order was made or resolution passed for winding up the company. Another condition was, that "the debentures of the series of which this debenture forms one shall all rank *pari passu* as a first charge on the property hereby charged, without any preference or priority one over another, and such charge shall be a floating security; but so that the company shall not be at liberty to create any mortgage or charge on its freehold or leasehold property in priority to the said debentures." The company issued no other debentures than those issued to the Plaintiff.

The company's property was of considerable value, consisting of freehold and leasehold properties, machinery, stock-in-trade (including raw material), and book debts.

The interest on his debentures having fallen into arrear, the Plaintiff served the company with notice to pay off the debenture debt and interest; but he was informed that the company was unable to meet its liabilities.

The company had also overdrawn its banking account, and was in fact unable to continue its business.

The Plaintiff then commenced this action against the company for a declaration that he was entitled, as the only debenture-holder, to a first charge upon all the property of the company; for an account; to have the debentures enforced by foreclosure or sale; and for a receiver and manager.

The Plaintiff now moved that Mr. *Henry Percy Ibotson*, the

managing director, might be appointed manager of the real and personal property and the business of the company, and receiver of the rents and profits and produce of the business, until further order.

In his affidavit in support of the motion the Plaintiff stated that the value of the company's assets depended entirely on the manner in which they were realized; that if a forced realization was made, or if the business of the company was not carried on until the raw material then in stock was manufactured and sold, the assets would not be sufficient to pay the amount of the debenture debt; that the most favourable realization would be obtained if the mills were worked until the raw material, which was considerable, had been manufactured into leather board and sold—a result which it would require three or four months' time to carry out, during which time the business might be sold advantageously as a going concern. The Plaintiff further stated that a sum would be required for the payment of wages and the carrying-on of the business for the current week, and that he was willing to advance such sum up to £500 if Mr. *Ibotson* were appointed receiver and manager.

The motion was also supported by affidavits of the fitness of the proposed receiver and manager.

Renshaw, Q.C., and *Hamilton*, for the Plaintiff:—

We ask for an interim receiver and manager until realization.

[KAY, J.:—You ask for a receiver and manager to carry on the business in the name of the company, and to give him all the powers of the directors of the company. On a mere debenture charging all the property of the company, have I jurisdiction to make such an order? Supposing a mortgagee entered into possession, he would have no such power.]

In *Peek* v. *Trinsmaran Iron Company* (1) the late Master of the Rolls held that in a similar action to this the Court had power to appoint an interim receiver and manager.

[*Farwell, amicus curiæ*:—In a recent case before Mr. Justice

(1) 2 Ch. D. 115.

KAY, J.
1890
MAKINS
v.
PERCY.
IBOTSON & SONS.

Chitty, of *Campbell* v. *Lloyd's, Barnett's, & Bosanquet's Bank* (1), an interim manager was appointed on the authority of *Peek* v. *Trinsmaran Iron Company* (2).]

(1) 1889. March 29.

CAMPBELL *v.* LLOYD'S, BARNETT'S, AND BOSANQUET'S BANK, LIMITED.

[1888 C. 1901.]

THIS was a foreclosure action by the Plaintiff, who was mortgagee of the freehold and leasehold premises and collieries (but not in terms of the "business") at *Chesterton, Staffordshire*, of the Defendants, the *Chesterton Coal and Iron Company, Limited*, and of the loose and fixed plant in and upon the premises. The Defendants, other than the company or some of them, claimed to be interested in the premises as subsequent incumbrancers. In May, 1888, the Plaintiff went into possession as mortgagee, and continued to work the collieries at an outlay considerably beyond his receipts as mortgagee in possession, the working being carried on and sales of coal and ironstone effected under the management of *Walter Ridout Wills*, a mining engineer, who was the company's manager at the time of the Plaintiff going into possession. By an order made on the 11th of May, 1888, in an action of *General Assets Purchase Company, Limited* v. *Chesterton Coal and Iron Company, Limited*, being an action on behalf of the debenture-holders of the *Chesterton Company*, a receiver was appointed of that company's property comprised in the debentures, but subject and without prejudice to the rights of any prior mortgagee; and in proceedings for the winding-up of the *Chesterton Company* that receiver was appointed liquidator.

On the 14th of March, 1889, an order was made in the present action of *Campbell* v. *Lloyd's, &c., Bank* for the usual accounts in a foreclosure action; and on the 29th of March, 1889, the plaintiff in such action moved for the appointment of the existing manager, *W. R. Wills*, as receiver of all the property of the Defendants, the *Chesterton Company*, comprised in his security, and the rents and profits thereof, and to manage the same.

Latham, Q.C., and *Rawlinson*, for the Plaintiff, cited *Peek* v. *Trinsmaran Iron Company* (2 Ch. D. 115) and *Huntington* v. *Coal Consumers' Association* (*Seton* on Decrees, 4th Ed., 421).

Farwell, for the Defendants, the *General Assets Purchase Company, Limited*, the Plaintiffs in the debenture-holder's action, said that the cases referred to were cases of applications by debenture-holders, and did not apply to the ordinary case of a mortgagee in possession.

The other Defendants in the present action, including the *Chesterton Company*, though served with the notice of motion, did not appear.

CHITTY, J., said the Plaintiff was mortgagee of freehold and leasehold collieries. Was it necessary to appoint a manager as well as a receiver? The receiver could not receive except by working the collieries, and if he did not work them the Plaintiff's security was gone. If the case rested on principle alone he should have held that the Court had power to appoint a

(2) 2 Ch. D. 115.

In *Boyle* v. *Bettws Llantwit Colliery Company* (1) a receiver and manager was appointed on the application of an unpaid vendor, who is in the position of a mortgagee. The language of our debentures is wide enough to carry all the company's property, including the goodwill. We will undertake to provide a sum up to £500 for working expenses during the current week, and also to answer for the receipts of the receiver and manager pending his giving security.

Eustace Smith, for the Defendant company, did not oppose.

KAY, J. :—

By this motion I am asked to appoint a receiver and manager of all this company's property comprised in the debentures held by the applicant, the Plaintiff in the action. No mention is made in the memorandum of association or the debentures specifically of the goodwill of the business, and the debentures are in the very same words as the memorandum of association, namely, "all its property both present and future, including its uncalled capital."

Now I am asked to appoint not merely a receiver, but a receiver

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manager as well as a receiver, notwithstanding that the colliery "business" had not been mortgaged in specific terms. But two authorities had been cited in support of the application, one of which, *Peek* v. *Trinsmaran Iron Company* (2 Ch. D. 115), before the late Master of the Rolls, was important. That was a motion by debenture-holders, and there the Master of the Rolls appointed a receiver and manager, saying that the Plaintiffs, the Applicants, were entitled to the benefit of their security and to secure the property in the only way in which it could be made secure, or otherwise it might go to ruin.

So that the principle on which the Master of the Rolls proceeded was the right of a person holding a charge upon property to the preservation of his security. That and that alone was the test to be applied.

With regard to the authority in *Seton*, it was only necessary to say that that, too, appeared to be to a similar effect.

Upon the authorities cited, and for the reasons he had stated, he would accede to the Plaintiff's application, and make an order appointing Mr. *Wills* receiver and manager; but the Plaintiff must be answerable for him until security was given.

Solicitors: *Walters, Deverell, & Co.*; *Davidson & Morriss.*

G. I. F. C.

(1) 2 Ch. D. 726.

KAY, J.
1890
MAEINS
v.
PERCY
IBOTSON &
SONS.

and manager of the business, this being a joint-stock trading company. The first question is, Is this within the jurisdiction of the Court? Supposing a mortgagee entered into possession of property of this kind, could he carry on the business of the company? It is clear he could not. But that does not completely answer the question, because a mortgagee in possession would not be an officer of the Court. Were it not for authority, I should hesitate very much before, on a debenture like this, I appointed a receiver and manager. The object of such an application as this is to enable the business of the company to be carried on, and supposing the receiver and manager did so fairly, his acts would bind the company. So that the result is, that if the business turned out to be a losing one the uncalled capital (if any) might have to be called up to pay such losses. In my opinion, that would be very strong indeed, and if this had been the first case of the kind I should hesitate very much to accede to such an application.

The matter came before a very experienced Judge, the late Master of the Rolls, in *Peek* v. *Trinsmaran Iron Company* (1), and there, although there was no opposition, there being an application by the holder of a debenture bond whereby all the company's effects and machinery were charged, and the motion was for both a receiver and manager, the late Master of the Rolls said, "I am of opinion that the plaintiffs are entitled to the benefit of their security, and are entitled to secure the property in the only way in which it can be made secure, as otherwise it may go to ruin. I know of no authority bearing on the question, but on principle I consider that they are entitled to have a manager appointed."

The opinion of the late Master of the Rolls on a question of this kind is of very considerable authority, and I am told that it has been followed in another case before Mr. Justice *Chitty*. Certainly it is remarkable that the case before the late Master of the Rolls is not referred to either in Mr. *Buckley's* work on Companies, or in Lord Justice *Lindley's* well-known work. However, there is authority for such an application; but I should be very glad if the question were brought to the attention of the Court

(1) 2 Ch. D. 115.

of Appeal and the matter settled. Such being the authority, I am asked in this case to appoint a receiver and manager, and the individual proposed to be appointed is the managing director of the company; and as I understand that the applicant undertakes to provide a sum up to £500 for the wages of the workmen and for the expenses of carrying on the business, and also to answer for the receipts of the proposed receiver and manager pending his giving security, I will make the appointment. The Plaintiff is the holder of all the debentures, amounting to £12,000, and I will accept his undertaking on those two points. I understand that the object of the appointment is to carry on the business of the company pending realization.

The applicant must therefore give an undertaking to realize the company's property as soon as possible.

I make the order as asked; but, I repeat, I do so with great hesitation.

The material parts of the order as drawn up were as follows:—

"And the Defendants by their counsel consenting, and the Plaintiff by his counsel undertaking to be answerable for all amounts received by the receiver hereinafter appointed until he shall have given security as hereinafter mentioned, and also undertaking to advance the necessary moneys, not exceeding in the whole £500, for payment of the workmen's wages and current expenditure, and to proceed, as soon as he conveniently can, to procure the realization of the property comprised in the debentures issued by the Defendant company: This Court doth appoint *Henry Percy Ibotson*, of &c., the managing director of the said company, to receive all the property of the company, and to manage the business of the said company."

Ibotson to forthwith give security.

The Defendants to hand over to him as receiver all assets, property, and effects belonging to the company, and comprised in the debentures, together with all books and papers relating to the same.

Ibotson to bring in his accounts as receiver, and pay in his balances.

Solicitors: *H. I. Ward; F. B. Moyle.*

G. I. F. C.

CHITTY, J.

1890

Dec. 4.

FRAMES *v.* BULTFONTEIN MINING COMPANY.

[1889 F. 812.]

Company—Remuneration of Directors—"Net Profits"—Percentage Sale of the Undertaking and Assets—Winding-up.

Articles of association provided that the directors should be paid in each year as remuneration for their services a sum equal to 3 per cent. on the "net profits" of the company of such year. The company resolved on a voluntary winding-up, for the purpose of selling its undertaking and assets to a new company. A very large profit was made by this sale. On an action by one of the directors for his proportion of the 3 per cent. on the profits so made:—

Held, that "net profits" in the article in question was intended to apply to profits made by the company as a going concern, and not to profits made by a sale of the whole undertaking and assets in a winding-up; that the directors' remuneration was intended to be a return for their services, to which the present sale was not attributable, and that accordingly the Plaintiff's claim failed.

Rishton v. *Grissell* (1) approved.

Action.

The *Bultfontein Mining Company, Limited*, was incorporated in June, 1880, with a nominal capital of £80,000, which was subsequently increased to £140,000.

The principal objects of the company were the purchase, opening, and working of diamond mines in *South Africa*, and "the selling or otherwise disposing of any mines, minerals, diamonds, precious stones, ore, or any other real or personal estate or property of the company."

By article 57 of the articles of association it was provided that, "as remuneration for their services the directors shall be paid in each year, out of the funds of the company, either a sum of £300, or a sum equal to 3 per cent. of the net profits of the company of such year, whichever shall be the larger sum." The articles also provided (136) for an appropriation of profits "out of the net profits" shewn by the annual account or balance-sheet. Dividends were to be payable only "out of profits arising from

(1) Law Rep. 5 Eq. 326.

the business of the company." The board were also authorized to "set aside the profits of the company," or such portion thereof as they should deem advisable, as a reserve fund to meet contingencies.

The Plaintiff was a director, and was duly paid his remuneration up to the 31st of May, 1887. In April, 1888, special resolutions were passed that the company should be wound up voluntarily, and that the undertaking and assets of the company should be sold to a new company, in return for fully paid-up shares. This sale was subsequently carried out, and the company thereby realized, as the Plaintiff alleged, a profit of £672,800, upon which sum the Plaintiff, as one of the five directors, claimed his proportion of the 3 per cent., contending that "net profits" in any one year included the profits realized by the sale of the undertaking to the new company. As this demand was disputed, the Plaintiff commenced the present action against the company, claiming a declaration that he was entitled, as remuneration for his services as a director, to one-fifth part of a sum equal to 3 per cent. of the net profits of the defendant company for the year ending the 31st of May, 1888, and that such net profits included the profit realized by the defendant company on the sale of its assets to the new company, and an account of the net profits for the year ending the 31st of May, 1888.

There was some dispute as to the actual profit realized by this sale to the new company; but the defendant company admitted that a large profit, amounting to over £400,000 nominal value, had been made, but denied their liability to pay to the Plaintiff any percentage upon this alleged profit.

The balance-sheet for the year ending the 31st of May, 1887, shewed a net profit on the profit and loss account of above £23,700.

Byrne, Q.C., and *Levett*, for the Plaintiff:—

By the articles it is provided that dividends are to be paid out of "profits," and in working a wasting property like a mine the excess of the proceeds of working or sale above the expenses of working may be distributed as dividend: *Lee* v. *Neuchatel*

CHITTY, J. 1890 FRAMES v. BULTFONTEIN MINING COMPANY.

Asphalte Company (1). So, too, the surplus realized by this sale over and above the nominal value of the assets is "profits," and profits realized in the year in which the sale takes place, and "profits" upon which the Plaintiff is entitled to commission. The voluntary winding-up cannot deprive the Plaintiff of his right to share in profits previously made. The company has power to sell any part of its property. Suppose one mine had been sold at an increased value, the surplus would have been "profits." The same reasoning applies to a sale of the whole of the property.

Maclean, Q.C., and *Ingle Joyce*, for the company:—

Accretion to capital by a lucky sale is not profits of the business. "Net profits" in article 57 must be taken in its sense of profits as shewn by the profit and loss account, the profits out of which dividends are usually and properly payable. The Plaintiff is not entitled to treat as "profit" the excess of the amount realized by the sale over the estimated value: *Rishton* v. *Grissell* (2), which is precisely in point.

Byrne, in reply:—

Rishton v. *Grissell* was a private partnership. Here one of the objects of the company was to sell any or all of the mines or real estate of the company.

CHITTY, J. (after reading article 57, and stating the facts, continued):—

The Plaintiff alleges, and for the purposes of my judgment I will assume, that a large profit was made by the company on this sale—a profit of some £600,000, the Plaintiff says, in shares, the actual value of which can no doubt be ascertained by an inquiry; and on this profit, whatever it may actually be, the Plaintiff claims one-fifth of 3 per cent. as being "net profits" of the year. In my opinion article 57 is addressed to the state of things existing while the company is a going concern, and does not apply to a winding-up or to any profit made by the sale of the whole undertaking. Unquestionably

(1) 41 Ch. D. 1. (2) Law Rep. 5 Eq. 326.

the directors might have sold any one of the company's mines; had they done so while the company was a going concern, and made a profit thereby, the surplus proceeds of sale, after providing for the estimated value of the mine, would have to be brought into the profit and loss account of that year; but the article in question has no application to a sale like the present, which was made under the paramount statutory power of the company under the winding-up. Another conclusion I come to upon reading this article is, that it provided remuneration for the directors in return for their services, and this sale was made by the company in the winding-up, and was in no way attributable to the services of the directors; so that for this reason also, the profit made on this sale is altogether outside the meaning of "net profits" in article 57.

A very similar point was brought before Vice-Chancellor *Wood* in *Rishton* v. *Grissell* (1), where the plaintiff, who was manager of the defendant's works, and was paid by a commission of 7½ per cent. on the profits of the business, claimed a commission on the excess of the amount realized by the sale of the works and business over the estimated value of the same in the books when the plaintiff was engaged, and the Vice-Chancellor in giving judgment says (2): "Now, taking this leasehold property, plant, and machinery,—that will be a constant quantity, subject only to the modifications which may have taken place in each current year. If the plant and machinery were originally put down at £20,000, or at £50,000, it would not make the slightest difference to the person employed. He has no interest in it. At whatever price it is first put down, at that amount it must be put down, subject only to depreciation, in the following year; and being put down as a constant quantity, it will strike itself out on both sides of the account, and be carried through the books at the same amount to the end of the partnership. If some new street were opened, the property might be sold at ten times the amount; but with that the plaintiff can have nothing to do; he would have no profit upon the sale of the concern." There are other observations throughout the judgment expanding what I have just read, and in the end the Vice-

(1) Law Rep. 5 Eq. 326. (2) Law Rep. 5 Eq. 329.

CHITTY, J. 1890 FRAMES v. BULTFONTEIN MINING COMPANY.

Chancellor refused the plaintiff's claim, and I think quite rightly. I turn to the company's balance-sheet for the year ending the 3rd of May, 1887, and I find that the property of the company is put down at a certain valuation, with an allowance for depreciation; there are items for sale of diamonds, and also for working expenses, and the result of the balance between assets and liabilities or working expenses is brought out at £23,740 9*s.* 9*d.* This shews how the business of the company was carried on, and it is with reference to the profits shewn on such an account as this, that article 57 applies. The sum of the case is, that this clause is not addressed to a sale by the company of the whole of its assets in a winding-up. The Plaintiff may have an account, if he chooses to take it, of the net profits made by the company for the year ending the 31st of May, 1888; but it must be prefaced by a direction that such net profits do not include any profit made by this sale to the new company; but as the Plaintiff's main claim fails, he must pay the costs of this action up to and including judgment. The costs of the account will be reserved.

Solicitors: *Goldberg & Langdon; Hollams, Sons, Coward, & Hawksley.*

W. C. D.

CHITTY, J. 1890 *Dec.* 5.

LAWRENCE *v.* EDWARDS.

[1890 L. 2818.]

Office of Parish Clerk—Bankruptcy of Incumbent—Sequestration of Benefice—Vacancy during Sequestration—Minister for the time being—Appointment by Stipendiary Curate—Injunction—Sequestration Act, 1871 (34 & 35 *Vict. c.* 45), *ss.* 1, 5, 6 [*Revised Ed. Statutes, vol. xvi., p.* 694].

The rector of a parish having been adjudicated a bankrupt, the bishop issued a sequestration, and appointed and licensed a stipendiary curate for the performance of the ecclesiastical duties of the parish; the office of parish clerk having become vacant during the sequestration, the rector appointed the Plaintiff to be parish clerk, and, subsequently, the curate appointed the Defendant to the same office. On a motion by the Plaintiff to restrain the Defendant from receiving the fees and emoluments of the office:—

Held, that the appointment of parish clerk had been rightly made by

the rector, notwithstanding the sequestration, and that the Plaintiff was accordingly entitled to an injunction.

Pinder v. *Barr* (1) discussed and distinguished.

The rights and position of an incumbent after sequestration, except so far as they are interfered with by the express terms of the *Sequestration Act*, 1871, remain unaltered.

MOTION.

This application raised the question whether, after the sequestration of a benefice, the right of appointing a parish clerk, is vested in the rector, or the stipendiary curate in charge. The facts were as follows:—

In April, 1889, the Rev. *Arthur Lawrence*, rector of *Eversley*, in the county of *Southampton*, was adjudicated a bankrupt and a trustee was appointed.

In May, 1889, the Bishop of *Winchester* issued a writ of sequestration to one *H. W. Lee*, which, after reciting the bankruptcy of the rector and that application for a sequestration of the profits of the benefice had been made by the trustee, proceeded, so far as material, as follows: "We therefore, the said Lord Bishop, in pursuance of the directions and provisions of the said Act of Parliament, and by the authority of the said appointment of trustee as aforesaid and in virtue of our episcopal office, all and singular the tithes, commutation of tithes, rent-charges, tenths, oblations, obventions, fruits, issues, and profits whatsoever to the said benefice and parish church of *Eversley*, in the said county of *Hants*, or to the said *A. Lawrence*, as rector thereof, or otherwise, howsoever belonging or appertaining, have sequestered. And we do sequester the same by these presents, and enjoin you, the said *Harry W. Lee*, to publish or cause to be published this our sequestration, by us interposed, to all and singular that are interested therein, on such days and at such times as are proper and convenient in this behalf, and also to ask, demand, collect, buy, and receive all and singular the said tithes, commutation of tithes, rent-charges, tenths, oblations, obventions, fruits, issues, and profits whatsoever to the said benefice and parish church of *Eversley*, or to the said *A. Lawrence*, rector thereof, howsoever belonging or in anywise appertaining. And that out of the

(1) 4 E. & B. 105.

CHITTY, J. 1890 LAWRENCE v. EDWARDS.

moneys arising therefrom, or for, or in respect of the said benefice, you do pay by quarterly payments such stipend as may be directed by us, to such person as may be duly appointed by us, to perform the duties of the said benefice, and also the salary (if any) payable to any duly licensed curate of the church of the said benefice in respect of duties performed by him as such during four months before the date of the receiving order made against the said bankrupt, not exceeding £50. And afterwards retain and allow unto yourself the reasonable and necessary charges, costs, and expenses of collecting and levying the same profits. And also all other necessary and lawful costs and expenses incurred and to be incurred in and about the premises. And cause all other charges of and belonging to the said benefice and profits to be sustained and discharged. And after payment of the said stipend salary (if any), charges, costs, and expenses out of the same benefice and profits, to pay the whole residue and balance thereof into the proper hands of the said *George Adams*, as such trustee of the estate and effects of the said *Arthur Lawrence*, for the purposes directed by the said Act. We commit our full power and authority by these presents till we have decreed the same to be relaxed. And we do ordain, constitute, and appoint you special sequestrator and collector of the said benefice by these presents."

In March, 1890, the bishop appointed and licensed the Rev. *H. P. Edge*, "to perform the office of stipendiary curate, in the parish church of *Eversley*, within our diocese and jurisdiction, in preaching the Word of God and in reading the common prayers, and performing all other ecclesiastical duties belonging to the said office, according to the form prescribed in the Book of Common Prayer, made and published by authority of Parliament, and the canons and constitutions in that behalf lawfully established and promulgated, and not otherwise or in any other manner. And we do by these presents assign unto you the yearly stipend of £200, to be paid quarterly, for serving the said cure."

In October, 1890, one *Frederick Marshall*, the parish clerk, died.

By the 91st canon it is provided that "No parish clerk upon

any vacation shall be chosen in the city of *London*, or elsewhere, but by the parson or vicar; or where there is no parson or vicar by the minister of that place for the time being, which choice shall be signified by the said minister, vicar, or parson, to the parishioners, the next Sunday following, in the time of divine service." On the 1st of November, 1890, the rector appointed his son, the Plaintiff, to be parish clerk by a deed poll under his hand and seal; and on Sunday, the 19th of November, the Rev. *H. P. Edge*, announced during morning service in the parish church, that he had appointed the Defendant to be parish clerk in the place of *F. Marshall*, deceased.

Some correspondence between the rector and the bishop followed, with reference to the validity of the appointment of parish clerk by the curate, in the course of which the bishop stated, that he was advised that the rights of the minister were, under the circumstances, in the hands of the bishop or of the curate in charge appointed by him, and that, though regretting the precipitancy of the appointment by the curate, he was bound to confirm it.

The Plaintiff thereupon commenced the present action, and served a notice of motion on the Defendant to restrain him from acting or purporting to act as parish clerk of *Eversley*, and from receiving any fees, profits, or emoluments belonging or appertaining to such office.

No inhibition, either in pursuance of the *Sequestration Act*, 1871, or otherwise, had been issued against the rector, who continued to reside in the parish and occupied the rectory house. It was stated that it was the custom in the parish of *Eversley* from time immemorial that the parish clerk should be appointed by the rector.

Counsel for the Plaintiff, on opening the motion, stated that he should only ask for an injunction to restrain the Defendant from receiving any fees or emoluments belonging to the office.

Willis Bund, for the motion:—

Though a writ of sequestration has been issued, the rector has not been inhibited or suspended; therefore he had authority to

CHITTY, J. 1890 LAWRENCE v. EDWARDS.

make this appointment. In *Pinder* v. *Barr* (1), the incumbent had been suspended; therefore the curate was really the "minister for the time being" within the words of the 91st canon; and that case went on the construction of the canon, not on the wording of the bishop's license. Sequestration is only an ecclesiastical execution, which, while taking the profits of the benefice towards payment of the incumbent's debts, at the same time allows provision to be made for the due performance, by a stipendiary curate, of the ecclesiastical duties of the parish. The effect of a sequestration was considered at some length in *Pack* v. *Tarpley* (2), in which the writ of sequestration was the same as in the present. Sects. 5 and 6 of the *Sequestration Act*, 1871, deal expressly with certain rights of the incumbent; therefore the rights of the incumbent are only interfered with by that Act to the extent therein provided, and no further; and as the rector here has not been inhibited, he still retained the right of making the appointment.

The Defendant did not appear either in person or by counsel on this motion.

CHITTY, J. (after stating the facts, and the nature of the question he was called upon to decide, continued):—

The injunction I am asked for at the Bar is merely to restrain the Defendant, until judgment or further order, from receiving the profits and fees of the office; I am not asked to interfere in any way with the Defendant performing his duties as parish clerk in the church itself. It is unfortunate that the Defendant has not appeared on this motion, and that I have not had the benefit of any argument on his behalf; but Mr. *Willis Bund* has put the whole case very fairly before the Court, and I am bound to come to some conclusion, for the purposes of this motion, upon such argument as has been presented to me.

Now, it has been decided in the case of *Pinder* v. *Barr*, that where the vicar was suspended for misconduct by the bishop from performing the duties and receiving the profits of the vicarage, he was not the proper person, and had no authority to

(1) 4 E. & B. 105. (2) 9 Ad. & E. 468, 482.

appoint a parish clerk, so long as the suspension remained in force. The question there turned upon the construction of the 91st canon, which was considered by the Court of Queen's Bench, which in that case held that "the minister for the time being," was the curate who had been appointed by the bishop to perform the ecclesiastical duties of the parish; and the Court also held that the curate was entitled to make the appointment, not by virtue of the bishop's license, but by virtue of the canon; and that on the true construction of this canon, inasmuch as the vicar had been suspended from his functions, the term "minister" applied to and included the curate. It follows, therefore, from that case, that if the rector in the present case had been suspended or inhibited, he would have had no authority to appoint a parish clerk. But the rector has not been suspended or inhibited, though he has been adjudicated bankrupt, and a sequestration has been issued, and I therefore turn to the *Sequestration Act*, 1871, with a view of ascertaining what is the effect upon the rector, in this case, of the sequestration. The 1st section provides that on a sequestration the bishop may appoint a curate and assign him a stipend; nothing turns upon the particular language of that section, which goes on to provide how the stipend is to be paid, and the amount; but the 5th section is one of considerable importance: it provides that, "In case any such sequestration remains in force for more than six months, the bishop, if it appears to him that scandal or inconvenience is likely to arise from the incumbent continuing to perform the services of the Church while the sequestration remains in force, may, from and after the expiration of such period, inhibit the incumbent from performing any services of the Church within the diocese as long as the sequestration shall remain in force, and the bishop may at any time withdraw such inhibition." From this it seems plain that during the sequestration, unless the bishop makes such inhibition, the incumbent may still perform the services of the Church; and, consequently, it appears to follow that sequestration is very different from suspension. In fact, sequestration is this, that the proceeds of the benefice are taken by an officer appointed by the bishop for the purpose, but in other respects the position of the incumbent,

CHITTY, J. 1890 LAWRENCE v. EDWARDS.

except so far as it may be expressly altered by the statute, remains the same. That position, I think, is established, not merely by the 5th section, but by the 6th, which provides that, "During such time as any sequestration remains in force, the incumbent shall be absolutely disabled from presenting or nominating to any benefice then vacant, of which he may be patron in right of the benefice under sequestration." That is to say, one of the rights which belong to the incumbent in virtue of the benefice is taken away in express terms: this is properly made use of by Mr. *Willis Bund* to shew that, except to the extent that the Act in terms interferes with his position, the incumbent in this case still retains the character of rector, as undoubtedly he retains the rights belonging to the rector. For these reasons, I hold that the appointment to the office of parish clerk has, on this occasion, been rightly made by the rector, notwithstanding the sequestration; and I give effect to that opinion to the limited extent asked at the Bar, viz., by restraining the Defendant, until the trial or further order, from receiving the fees, profits, or emoluments belonging to the office of parish clerk. It will, of course, be open to the Court to consider the matter again should there be any further argument upon the trial.

Solicitors: *Withall, Holland, & Withall.*

W. C. D.

In re GRAHAM'S TRUSTS.

CHITTY, J.

1890

Dec. 6, 9.

Practice—Trustee—Payment into Court—Chancery Funds Consolidated Rules, 1874, *r.* 34—*Trustee Relief Act*, 1847 (10 & 11 *Vict. c.* 96) [*Revised Ed. Statutes, vol. x., p.* 277]—*Chancery Funds (Amended) Orders*, 1874, *Order* 5—*Supreme Court Funds Rules*, 1886, *rr.* 2, 41—*Notice to Persons entitled to Fund.*

A trustee who pays a fund into Court under the *Trustee Relief Act*, not being required since the repeal of the Chancery Funds Consolidated Rules, 1874, to set forth in his affidavit the names of the persons entitled to the fund, is no longer bound to give notice to such persons under order 5 of the Chancery Funds (Amended) Orders, 1874, that order having been rendered of no effect by such repeal.

PETITION.

The trustees of the will of *J. Graham* paid into Court under the provisions of the *Trustee Relief Act* the funds representing a specific legacy thereby bequeathed (which the will directed should be so paid in) and also so much of the testator's residuary personal estate as was thereby given to the Petitioner, and in their affidavit they stated as to the last mentioned funds, that they had received notice that the Petitioner had made two assignments, to one *R. Hargreaves* and one *E. N. Marks*, of some share or interest of his under the will, which were dated on the day he attained twenty-one, but were executed before such date; that such notice was received, not from the assignees, but from the father of the Petitioner; and that subject to this the Petitioner was entitled to the fund.

In this petition for payment out of the fund, and in the affidavit in support thereof, the Petitioner stated that the assignments in question were executed in *Brisbane, Queensland*, before he attained twenty-one, that he had in no way re-executed, confirmed or acknowledged their validity since, and that they were of no legal validity against him.

The petition was served only on the trustees of the will, and the question was whether notice of the payment of the fund into Court should have been given to *R. Hargreaves* and *E. N. Marks* by the trustees.

CHITTY, J.
1890
In re GRAHAM'S TRUSTS.

The Chancery Funds Consolidated Rules, 1874, rule 34, provides that a trustee desiring to pay money into Court under the *Trustee Relief Act* shall file an affidavit setting forth (*inter alia*) "the names of the persons interested in or entitled to the money," and the Chancery Funds (Amended) Orders, 1874, order 5, provides that a person having made a payment of money into Court under the *Trustee Relief Act* "shall forthwith give notice thereof to the several persons named in his affidavit to be made in pursuance of rule 34 of the Chancery Funds Consolidated Rules, 1874, and the said Act, as interested in or entitled to such money."

The Chancery Funds Consolidated Rules, 1874, were revoked by rule 2 of the Supreme Court Funds Rules, 1884. By the Supreme Court Funds Rules, 1886, rule 2, it is provided that "all other rules or general orders prescribing the mode of dealing with funds in Court, and containing any provisions relating to funds in Court inconsistent with these rules, are hereby revoked and these rules substituted therefor"; and in rule 41 of such rules the names of the persons interested in or entitled to the funds are not included among the matters required to be set forth by the trustee.

Maclean, Q.C., and *Prior*, in support of the petition:—

Order 5 of the Chancery Funds (Amended) Orders, 1874, was revoked by rule 2 of the Supreme Court Funds Rules, 1884, or at any rate it is now of no effect as rule 34 on which it depended has been revoked. In *In re Stening's Trusts* (1) Mr. Justice *Pearson* did not decide that order 5 is still in force.

Method, for the trustees.

CHITTY, J.:—

The form of affidavit to be made by a trustee who is desirous of paying funds into Court is stated in rule 41 of the Supreme Court Funds Rules, 1886, which unquestionably is the subsisting rule. This form does not require the trustee to set forth "the

(1) 50 L. T. (N.S.) 586.

names of the persons interested in or entitled to the money or securities and their places of residence, to the best of his knowledge and belief." By the Chancery Funds Consolidated Rules, 1874, rule 34, a trustee was required to state in his affidavit "the names, &c. . . ." Now I must take it that this matter was present to the authorities who framed the rules of 1886, and that in passing them this requirement was deliberately omitted. The Chancery Funds Consolidated Rules, 1874, are clearly abrogated, and rule 34 no longer exists. But by the Chancery Funds (Amended) Orders, 1874, order 5, a person paying money into Court under the *Trustee Relief Act* is required to "forthwith give notice thereof to the several persons named in his affidavit to be made in pursuance of rule 34 of the Chancery Funds Consolidated Rules, 1874, and the said Act, as interested in or entitled to such money." Now it appears that this order has never been in terms repealed by any subsequent orders and rules, but the question remains whether it is now of any effect. I think the answer must be that it is now of no effect. As under the subsisting form of affidavit a trustee paying a fund into Court is not required to set forth the names of the persons interested in or entitled thereto, it follows that he cannot be required to forthwith give notice to the persons named therein under this rule 34.

I take it that this change was made deliberately, and because of the great difficulty trustees found in giving the notice. Often a trustee paid money into Court because he was unable to find out the persons interested in or entitled to it, and to require him to give notice to them was to require what was impracticable. It is true order 5 required notice only to the persons named, but a trustee might well be able to give the names of persons and yet not know their addresses. It was therefore intended to relieve him from the obligation of giving them notice. Besides, as the matter must in every case come before the Court, the fund is sure not to be parted with until the right persons have been served. I may add that in *In re Stening's Trusts* (1) Mr. Justice *Pearson* gave no decision inconsistent with mine, but merely said he thought it desirable that notice should be served as early

(1) 50 L. T. (N.S.) 586.

CHITTY, J.

1890

In re GRAHAM'S TRUSTS.

as possible on the parties mentioned in rule 34. I purposely leave untouched the point whether or not order 5 of the Chancery Funds (Amended) Orders, 1874, is repealed by the general effect of rule 2 of the Supreme Court Funds Rules, 1886.

[In the result his Lordship ordered the fund to be paid out to the Petitioner without any notice being served on *Hargreaves* and *Marks*.]

Solicitors: *Johnson, Budd, & Johnson.*

G. M.

In re BRIDGEWATER NAVIGATION COMPANY.

NORTH, J.

1890

Dec. 2, 3.

Company—Winding up—Surplus Assets—Rights of Contributories inter se—Ordinary and Preference Shareholders—Income and Capital.

The articles of association of a company which had power to increase its capital provided that the directors might set aside out of profits sums as a reserve for specified purposes and other contingencies in priority to dividends, and, subject to that provision, that the entire profits of each year should belong to the shareholders. Under the power to increase capital, shares with a fixed preferential dividend had been created.

The undertaking of the company was sold by Act of Parliament at a price which left a surplus in excess of the liabilities of the company and the paid up capital.

The sale was completed during the currency of a financial year:—

Held, that the ordinary shareholders were entitled to the net profits of the current year (subject to paying an apportioned dividend to the preference shareholders), including a balance carried forward from the last year, and a sum reserved for canal improvements, and not so applied;

(2.) That they were not entitled to reserve funds for insurance and depreciation;

(3.) Nor to any inquiry as to the excess of the real value of plant and works over the value stated in the published accounts, or as to any application in the past accounts to capital purposes of sums which might have been divided as profits.

THE *Bridgewater Navigation Company, Limited*, was registered in August, 1872. Its objects included the acquisition and working of certain canals and works and property connected therewith, called in the *Manchester Ship Canal Act*, 1885, referred to below, the *Mersey and Irwell Undertaking* and the *Bridgewater Undertaking*.

In the months of August and September, 1874, special resolutions of the company were passed rescinding the original articles of association, and substituting fresh articles, of which the following are material:—

"3. The company may by the resolution of a general meeting increase its capital beyond the amount mentioned in the memorandum of association by the creation of new shares of such amounts per share and in the aggregate as such resolution shall direct, and any new capital so created may carry such preferential right to dividend, or such priority in the distribution of

NORTH, J. 1890 *In re* BRIDGEWATER NAVIGATION COMPANY.

assets, or be subject to such postponement of dividends or in the distribution of assets as any resolution of a general meeting passed previously to the issue of any such new capital shall direct. But save as specified in any such resolution, all new capital shall be subject to the same provisions in all respects as if it had been part of the original capital mentioned in the memorandum of association."

"83. No dividend shall be paid except out of the profits of the company arising from the business of the company, as shewn upon the balance-sheet, which shall from time to time have been examined and passed by the auditors.

"84. The directors may, in priority to any dividend, set aside out of the profits of the company such sum as they think proper as a reserve fund for effecting purchases, redeeming mortgages or rent-charges wholly or in part, repairing or maintaining works, plant, or other property of the company, answering damages, or meeting any other contingencies or purposes of the company, and the directors may invest the sum so set aside in or upon such securities as they may select other than the shares of the company, or place the same or any part thereof upon deposit at interest, whether fixed or variable, with any bank or banking or discount company. Any interest derived from such investment or deposit shall be dealt with as profits arising from the business of the company, and be subject to this article.

"85. Subject to the last preceding article, and subject to any arrangement which may from time to time have been entered into relative to the remuneration of any manager or other officer of the company by way of commission or a per-centage on the net profits of the company or any part thereof, the entire net profits of each year shall belong to the holders of the shares of the company and be divided *pro rata* upon the whole paid-up share capital of the company, and the directors may, with the sanction of the company in general meeting, declare a dividend to be payable thereout on the shares in proportion to the amounts paid up thereon.

"86. The directors may of their own authority, once in each year, pay to the members a sum on account of dividend on their respective paid-up share capital."

At the date of the meeting next referred to the company had issued 100,000 £10 shares. At an extraordinary general meeting of the company held in April, 1880, it was resolved to issue 30,000 £10 preference shares on the following terms and conditions: "(1.) The new shares to entitle the holders thereof to a dividend after the rate of 5 per cent. per annum upon the amount for the time being called up thereon, and taking precedence and priority over all dividends and claims of the holders of the ordinary shares of the company," and other conditions of a temporary character.

The whole of the 30,000 £10 preference shares were issued on the terms of the extraordinary resolution. The whole amount of the preference shares was paid up. On each of the 100,000 ordinary shares £3 10*s.* was paid up.

By the *Manchester Ship Canal Act*, 1885, s. 22, it was enacted:—

"With respect to the *Mersey and Irwell Undertaking* and the *Bridgewater Undertaking*, the following enactments and provisions shall have effect (that is to say):

"1. The company shall within two years after the passing of this Act purchase from the navigation companies the *Mersey and Irwell Undertaking* and the *Bridgewater Undertaking* (excepting moneys of the navigation companies in their bankers' hands and balances due to those companies on current account at the time of the completion of the purchase and consumable stores), subject to all statutory obligations and to all chief and ground rents and terms of years now affecting the same, and to all such other covenants and liabilities under which the navigation companies purchased the same as are subsisting at the date of the completion of the purchase, but as between the company and the navigation companies free and discharged from all mortgages, debentures, and all trade and other debts affecting the said undertakings or either of them, or the navigation companies or either of them; and the navigation companies shall sell and convey the said undertakings (except and subject as aforesaid) to the company upon payment to them by the company of the sum of £1,710,000, being the agreed purchase price of the said undertakings, and shall discharge and in the meantime

NORTH, J.
1890
In re BRIDGEWATER NAVIGATION COMPANY.

indemnify the company against all such mortgages, debentures, trade and other debts; and the powers by this Act granted to the company to enter upon, take, and use the said undertakings for the purposes of this Act shall not take effect unless the company shall pay the said price within the period hereinbefore prescribed.

"2. The undertakings of the navigation companies, which, by this Act the company shall purchase from the navigation companies at and for the price of £1,710,000, shall include the working plant of the navigation companies, as shewn and described in their stock account on the 31st of December, 1884, and, if in the ordinary course of business between that date and the completion of the purchase, any working plant as shewn on the said stock account shall have disappeared or altered in quantity or value, or in case in the ordinary course of business such working plant has been increased in quantity or value, the diminution in quantity or value, or the increase in quantity or value shall be made good to the company or to the navigation companies, as the case may be."

By other sub-sects. of sect. 22, provision was made for the carrying on of the undertakings till the purchase was completed by the navigation company, for the taking over of consumable stores at a valuation, and otherwise for the adjustment of matters requiring adjustment on the transfer being completed.

The sale was carried out in August, 1887, the property of the navigation company was delivered over to the *Ship Canal Company* on the 6th of August, 1887, as from the 4th of August, and the sale was finally completed on the 26th of August. Resolutions for voluntarily winding up the navigation company were duly passed and confirmed at meetings held on the 10th and 26th of August, 1887, and the applicants in this matter were appointed liquidators.

The liquidators applied to the Court for the determination of the question how the surplus assets of the company, after satisfaction of the liabilities of the company, the return of paid up capital and payment of the costs of the liquidation ought to be divided between the ordinary and preference shareholders.

By direction of the Judge, meetings of each class of share-

holders were held, and Mr. *Birch* was appointed to represent the ordinary shareholders, and Mr. *Schofield* to represent the preference shareholders, in proceeding before the Court to settle the respective rights of the two classes of shareholders. That application was heard before Mr. Justice *North*, and by the consent of the parties and with the approval of the Court, the particular questions now to be considered were reserved for future consideration. Mr. Justice *North* (1) then decided that the two classes of shareholders were entitled to participate in the surplus assets in proportion to the amounts paid up on their shares, and the Court of Appeal affirmed his decision (1). The ordinary shareholders appealed to the House of Lords. The House of Lords held that the shareholders were entitled to participate in the surplus assets in proportion to the number of their shares, and varied the order of the High Court. The material part of the order as varied was a declaration "that the balance of the proceeds of sale of the said undertaking to the *Manchester Ship Canal Company*, remaining after satisfaction of all the debts and liabilities of the *Bridgewater Navigation Company, Limited*, and after adjusting the rights of the shareholders *inter se* (other than their rights in respect of the purchase-money) and after payment of the costs of the liquidation and repayment to the shareholders (both ordinary and preference) of the capital respectively paid on their shares, ought to be divided amongst the holders of all the shares in the said company in proportion to the shares held by them respectively" (2).

The present application was a motion on the part of the liquidators, to which Mr. *Birch* and Mr. *Schofield*, the representatives of the two classes of shareholders, were respondents to obtain the declaration of the Court as to the questions reserved at the hearing of the former application. The parties now agreed as to all but three, which were as follows:—

(1.) Whether there ought to be paid to the ordinary shareholders a sum of £43,500, or any other and what sum (if any), representing the funds of the company held or set apart by way of reserve.

(2.) Whether there should be paid to the ordinary shareholders

(1) 39 Ch. D. 1. (2) 14 App. Cas. 525.

NORTH, J. 1890 *In re* BRIDGEWATER NAVIGATION COMPANY.

such a sum, if any, as represents the amount of profits which on the 6th of August, 1887, (or on the 26th of August, 1887), remained undivided amongst the shareholders (either including or in addition to the items 1 and 3 herein mentioned) or any portion of such profits, and whether subject to the payment thereout to the preference shareholders of any and what proportion of such profits.

(3.) Whether there should be paid to the ordinary shareholders sums equivalent to all sums which have been applied from time to time out of current revenue of the company, in payment of expenses which ought to have been paid out of capital.

The sums which the ordinary shareholders claimed in respect of income applied to capital purposes included more than £40,000, which had been expended, according to the evidence of their accountants, on purchases and improvements, not in any way appearing in either the capital accounts or the balance-sheets of the company from time to time submitted to the shareholders: a sum of over £17,000, the difference between the stock-taking value and the value in the capital account of the company on the 31st of December, 1884: and a sum of upwards of £25,000 constituted partly of excess of valuation of the debts owing by the company and under-estimate of the debts owing to the company in the balance-sheet for the 31st of December, 1886.

The sum of £40,000 was the estimate (made by an accountant employed on behalf of the ordinary shareholders) of the value of property purchased and improvements made over a series of years, of which the purchase of a steam-tug, called the *Queen of the Mersey*; and the putting floors to certain sheds; were examples.

There was evidence that it had been the practice of the directors acting in their discretion for nearly the whole period of the existence of the company to keep the valuation of the Plaintiffs' works in the capital accounts annually submitted to the members considerably below the actual value ascertained and entered in the stock-books of the company; and also from time to time to expend part of their gross revenue in purchasing and improving property of the company.

The only material facts bearing on the question relating to the profits of 1887 were that after the division of profits among the shareholders for the year 1886 there was a surplus carried forward of £3410, and that in July, 1887, the directors declared and distributed the usual interim dividend. Questions were also raised on the evidence as to whether certain sums distributed on the winding-up of the company among servants and certain costs incurred in respect of opposition to the *Manchester Ship Canal Act*, ought to come out of income or the surplus property of the company, but no decision was now given upon those two details.

The sum of £43,000 mentioned in the first question comprised three items appearing on the credit side of the balance-sheet of the company struck for the 31st of December, 1886, under the heads, "Depreciation of steamers," "Insurance fund to cover risks on the *Mersey*," and "Canal and river improvement fund." The history of the reserve funds of the navigation company, so far as is material, is as follows:

It was the practice of the company to hold their general annual meeting at the beginning of February in each year. A printed report for the previous year from the 1st of January to the 31st of December was presented to the shareholders, with accounts for the year and balance-sheet struck for the 31st of December. In the balance-sheet for the 31st of December, 1883, the following reserve funds appeared: "Depreciation of steamers, £31,282 6*s.* 6*d.*"; "Canal improvement fund, £6000"; and "Insurance fund to cover risks on the *Mersey*, £9148 18*s.* 8*d.*" In the report for the year 1884 the directors stated they had increased the river risks reserve by £1000, and recommended out of the amount available for dividend the placing to a reserve fund of £4000. The sums credited to reserve in the balance-sheet for the 31st of December, 1884, were: "Reserve fund, £4000"; "Depreciation of steamers, £31,282 6*s.* 6*d.*"; "Canal improvement fund, £6000"; and "Insurance fund to cover risks on the *Mersey*, £9834 18*s.* 9*d.*"

By the report of the directors presented to the annual general meeting of the company held in February, 1886, it appeared that there was for the year ending the 31st of December, 1885, a

NORTH, J. 1890 *In re* BRIDGEWATER NAVIGATION COMPANY.

net profit of £59,088 6*s.* 7*d*; and that after payment of interest on loans and bonds, "and increasing the river risks fund (to make £10,000) by £165 1*s.* 3*d.*," there remained a sum (including a balance from the last year "and a transfer from reserve funds, as explained below, of £13,282 6*s.* 6*d.*") available for dividend of £65,987 14*s.* 9*d.* It was stated later in the report, "the sum of £13,282 6*s.* 6*d.*, included in the sum for distribution, is an amount credited to revenue account hitherto apportioned to the reserve fund, which in view of the sale of the undertaking to the *Ship Canal Company* is not now required, and may therefore be distributed to the shareholders in the form of a bonus." The sums credited to reserve in the balance-sheet for the 31st of December, 1885, were "Depreciation of steamers, £28,000"; and "Insurance fund to cover risks on the *Mersey*, £10,000."

By the report of the directors presented to the annual general meeting of the company held in February, 1887, it was stated that the net profit for the year ending the 31st of December, 1886, was £58,547 18*s.* 6*d.*; that after payment of interest on loans, "increasing the steamer depreciation fund by £2000, and putting aside for canal and river improvements in 1887, £3500," there remained a sum which with the balance from last year made an amount available for dividends of £46,436 19*s.* 10*d.* A dividend was declared at the meeting to the amount of £43,000, leaving a balance of £3,436 19*s.* 10*d.* to be carried forward. On the debit side of the balance-sheet appended to the report the following reserve funds appeared: "Depreciation of steamers, £30,000" (an increase of £2000 on the amount in the balance-sheet of the previous year), "Insurance fund to cover risks on the *Mersey*, £10,000" (the same amount that had appeared in the previous balance-sheet), and "Canal and river improvement fund, £3500" (a new item). No sum was expended by the navigation company during the year 1887 in canal or river improvements.

Napier Higgins, Q.C., and *S. A. Sampson*, for the liquidators.

Cozens-Hardy, Q.C., and *O. Leigh Clare*, for the representative of the ordinary shareholders:—

Under the terms of the Act of Parliament which effected the

sale the business was to be carried on for the benefit of the selling company down to the day on which the undertakings changed hands—that was, subject to the same incidents and rights as between the members, so that the preference shareholders would get their apportioned dividends in the nature of interest for the period since they had received the last dividend, and the other shareholders would be entitled to the profits down to that date. The profits to which the ordinary shareholders are entitled would include certainly the balance brought forward from the last annual account and the earnings of the year, subject to the power of the directors, if they thought fit, to appropriate part of the gross profits to reserve. The reason for making a reserve having come to an end, no deduction would be made for that purpose.

But further than that, in a company like this where there is power to create additional capital, the authorities *Bouch* v. *Sproule* (1) and *In re Alsbury* (2) decide that the profits kept back (rightly kept back in the discretion of the directors) and used (as what may in one sense be called capital) either under the name of reserve, or as what is in reality in the same position as reserve by way of margin, in valuations in audited accounts, for the sake of safety and by way of extreme caution, are none the less profits which the directors have full power in their discretion to throw into the divisible profits for any year. In fact the accounts of the company furnished to the meetings shew that the directors have, when it was thought expedient so to do, put portions of the reserves from former years into the net profits divisible at the meetings. It makes no difference whether this is done by the discretion of the directors or by the operation of a statute. We ask an inquiry what the ordinary shareholders are entitled to by reason of the appropriation of profits to capital purposes.

Buckley, Q.C., and *Swinfen Eady* for the representative of the preference shareholders:—

The judgment of the House of Lords, in varying the judgment of this Court, deals in terms with the purchase-money, and precludes the questions now argued from the consideration of the

(1) 12 App. Cas. 385. (2) 45 Ch. D. 237.

NORTH, J. 1890 *In re* BRIDGEWATER NAVIGATION COMPANY.

Court so far as the £1,710,000 is concerned, except as to certain items. We admit that so far as those items are concerned the questions are open.

As to the principle of the decision of the House of Lords in *Birch* v. *Cropper* (1), this Court is concluded in respect of the whole sum. According to the principle of that case as laid down in this Court, the Court of Appeal, and the House of Lords, the reserve funds, any excess in selling value of the stock over the amount in the accounts, and the extra price given owing to the circumstances of the sale, are, we admit, profits in one sense; but they are not profits within the meaning of article 85. Such of these items as existed while the company was a going concern might have been taken out of the working capital and placed to the net profit account and divided. But till that was done they were part of the general property of the company not appropriated to profits, and when the Act became effectual by the carrying out the sale, that property was by the effect of the Act as construed by the House of Lords a property in which the shareholders of both classes have co-ordinate rights.

The decision of the directors (acting fairly in their discretion) were final as to what is divisible profits. With respect to the profits of the year 1887, the directors acted within their powers and according to their duty in declaring an interim dividend. But when the sale took place it became impossible to carry out the provisions of article 85, and the article was dead.

Cozens-Hardy, in reply.

NORTH, J.:—

The questions I have to deal with are those numbered one, two, and three in the notice of motion before me. As a preliminary point relating to those three questions, it is suggested that the matter is concluded by the case in the House of Lords, which decided what the rights of the parties were in respect to the purchase-money. It is said that the purchase-money is now all that is being distributed. When the matter was before me in the first instance, there was a reference to a reserve fund,

(1) 14 App. Cas. 525.

and that was treated as being the only matter to be excepted; but before the order was drawn up it was stated to me that there were other points that required adjustment before the exact sum which was divisible under the declaration, which I was asked to make could finally be ascertained. Those points were reserved, and the declaration which I did make was intended to apply not to the whole purchase-money, but only to such portions of the purchase-money as were available for distribution between the ordinary and preference shareholders, after satisfying all matters that clearly had to be provided for out of the fund before the clear surplus could be dealt with. In other words the only question argued really was as to this surplus fund available for distribution, after satisfying all prior payments that had to be made out of it; was that to go entirely to the ordinary shareholders, or was it to go to the ordinary and preference shareholders in some shares, and, if so, in what shares? Was it divisible between them? That was the only point that I decided, or that the Court of Appeal decided, or that the House of Lords decided. The declaration made by the House of Lords, as explained in their order, runs thus: "The balance of the proceeds of sale of the said undertakings to the *Manchester Ship Canal Company*, remaining after satisfaction of all the debts and liabilities of the *Bridgewater Navigation Company, Limited*, and after adjusting the rights of the shareholders *inter se* (other than their rights in respect of the purchase-money), and after payment of the costs of the liquidation and repayment to the shareholders (both ordinary and preference) of the capital respectively paid on their shares, ought to be divided among the holders of all the shares of the *Bridgewater Navigation Company, Limited*, in proportion to the shares held by them respectively." The order which I directed to be drawn up was this, as stated at page 122 of the appendix. "The balance of the proceeds of the sale of the undertaking remaining after satisfying all the debts and liabilities of the company, and adjusting the rights of the shareholders *inter se* other than their rights in respect of such balance, and the costs of the liquidation and repayment to the shareholders of all the capital paid up, ought to be divided in the way I have mentioned." I stated

NORTH, J. 1890 *In re* BRIDGEWATER NAVIGATION COMPANY.

that I must define what the surplus was about which I was making a declaration; and that the several matters I had then mentioned included all that had to be dealt with in some way or other before the complete amount of surplus could actually be arrived at. My declaration was intended to apply to the surplus, which was the sole point discussed before me, and in my opinion that is what is meant by the words in the House of Lords' Judgment, "the purchase-money." It cannot be taken literally, because, if so, I should have to read into that order, instead of "the purchase-money," the words "other than their rights in respect of the £1,710,000 payable by the *Ship Canal Company*." It is quite clear that was not the meaning of it, because a very large portion of this sum had to go in paying off debts and liabilities, and returning capital that had been paid up by the shareholders, and various other matters. All that was being dealt with was not the £1,710,000, but so much of that as remained after something had been taken from it. The only question is, what was taken from it. That is quite clear. It is what remained for division on the shares which were the subject of dispute, after satisfying everything else that had first to be satisfied out of it. I do not feel that there is any difficulty arising out of the form of the decision in the House of Lords, especially as upon this part of the case they adopted my order as drawn up, and did not make any variation whatever in it.

Then we come to the points raised by these three questions. I will deal first of all (although it is put second) with the right of the ordinary shareholders to receive something in respect of the profits of the broken year, between the 31st of December, 1886, which was the time up to which the last annual account was made up, and the 4th of August, 1887, the date as from which the concern was taken over by the *Manchester Ship Canal Company*. During that interval of seven months the ordinary business of the company was being carried on, and the directors did, on the 7th of July, declare in pursuance of the 86th Article an interim dividend. That payment no one has disputed, and I think that payment was rightly made, because it was a payment on account of what the ordinary shareholders were entitled to

from the profits earned during that time. It was not confined to the ordinary shareholders. The preference shareholders got their dividend at the rate of 5 per cent. per annum, and the ordinary shareholders theirs at the rate of 8 per cent. That was an interim dividend properly payable. Is the article to be construed literally? It is Article 83, and it says: "No dividend shall be paid except out of the profits of the company arising from the business of the company, as shewn upon the balance-sheet, which shall from time to time have been examined and passed by the auditors." No such balance-sheet has ever been passed for the year 1887, inasmuch as before the end of that year, which was the time when the auditors' functions would come into play, the business had stopped with this company, and had been taken over by the *Manchester Ship Canal Company*. All that Article 86 provides for is an interim payment on account of dividend, which would mean on account of a dividend which is to be ascertained at the end of the year upon a balance-sheet. But, in my opinion, the preparation of a balance-sheet is not of the essence of the matter at all. We have to consider what the rights of the shareholders are, although no balance-sheet was made up by reason of the summary determination of the company, as nearly as we can ascertain those rights, by reference to what they would have been if the business had continued until the end of the year, and an ordinary balance-sheet had been arrived at. Article 85 provides that, "Subject to the last preceding article," and so forth, "the entire net profits of each year shall belong to the holders of the shares of the company, and be divided *pro ratâ* upon the whole paid-up share capital of the company; and the directors may, with the sanction of the company in general meeting, declare a dividend to be payable thereout on the shares in proportion to the amounts paid up thereon."

Now, at the end of the year, whatever profits there were available for division would have been divided by the directors. They would have been applied first of all in paying 5 per cent. to the preference shareholders, and the balance would have been distributable among the ordinary shareholders. In my opinion such profits would, under the words of the 85th article, have

NORTH, J.
1890
In re BRIDGEWATER NAVIGATION COMPANY.

belonged to the holders of the shares in the company, and at the proper time (not at that moment, as I read it) are to be divided by the directors among the shareholders. Those, therefore, are given to the shareholders in the company; and having regard to what took place subsequently to the time when this article was penned, and to the fact that the preference shareholders were to receive 5 per cent. only, this article would have to be read as if it said, "shall after payment of the dividend to the preference shareholders belong to and be divided *pro ratâ* among the ordinary shareholders of the company." The question is, what it is that is to be so divided? In my opinion, it is the profits which would have to be divided at the end of the year, if the company had gone on to that time and had then come to an end. In my opinion, there is nothing in the summary determination of the business of the company which gives the preference shareholders a right to say that they shall receive more than interest at 5 per cent. out of the profits of that year. That is the contention; that is the profits of the broken year, which are admitted to have been more than 5 per cent. on the whole, are to be part of the property of the company, and so are divisible among all the shareholders, according to the number of their shares. In my opinion, that is not the true construction of the article, and what we must do is to arrive at, as nearly as possible, in adjusting the rights of the contributories *inter se*, what would have been the state of things at the end of the year if this summary determination of the company had not previously taken place. I think, therefore, there must be an inquiry for the purpose of ascertaining what were the net profits earned by the company between the 31st of December, 1886, and the 4th of August, 1887. The inquiry will be, What profits were so received which, but for the determination of the company, would in the ordinary course have been divisible amongst the shareholders at the end of the year.

Buckley:—

Your Lordship assented, as I understand, to this being described as trading profit of the company.

NORTH, J.:—

No; I do not think it should be confined to that. It is the net profits of each year. Those are the words used in article 85. I mean the net profits that would have been divisible. Net profits in that article would clearly include any interest derived from investments or deposit in a reserved fund, if there had been any. I think they are entitled to that, but I do not think they are entitled to more. I think that the idea that the net profits of the year can include the difference between an estimated value and the real value of the plant, or anything else of that sort, is not tenable. In my opinion, they are not entitled to that. Therefore I confine what I said to the profits of the year.

Then the next point is this. The ordinary shareholders claim the sum set apart in respect of reserved fund, consisting of the three items: depreciation of steamers, the canal improvement fund, and the insurance fund. Now, as regards the canal improvement fund, I think they are entitled to that. I think that was a sum set apart from the beginning of 1886—£3500—under the circumstances stated in the directors' report. The report finds what the receipts are and the expenditure of the year, and then proceeds to set apart payments for interest on loans and bonds, to increase the steamer depreciation fund, and to put aside for canal and river improvements in 1887, £3500. That is the sum set apart for the purpose, and that is taken out of the fund that otherwise would have been available for dividend. No part of that was so spent—no part of it could be so spent. In my opinion, that comes under the words of article 84, and it is a sum which the company have set aside out of profits as a reserve fund for wholly or in part repairing or maintaining works, plant, or other property of the company. It was not invested on a separate security, but that, in my opinion, is immaterial. Mr. *Buckley* does not rest any part of his argument on that fact. The result is that that is a sum that can be fairly treated as set apart; and, not being required for that purpose, it has not ceased to be profit, and must be in the same position as the other profits.

Then, as regards the two other sums, the depreciation of

NORTH, J. 1890 *In re* BRIDGEWATER NAVIGATION COMPANY.

steamers and the insurance fund, I do not think those are profits at all. They are really sums which have to be taken into account before you can say what the profits actually are. Taking the insurance fund as an illustration, if the ordinary course of persons carrying on their business in a small way had been followed, the payments for insurance would have been made out of the current income of the company to an insurance company, or to underwriters, or whatever they might be; and that money would have disappeared altogether. In the present case that was not the course adopted. The company chose to be their own insurers—in other words, they took the risk of any losses they might sustain. If a barge or a vessel were lost, so much of the property of the company would be gone; and to prevent it being diminished in that way the same sum is taken out of the profits of the company, and put into the general funds of the company, as would have been paid over to other persons if the insurance had been effected with other persons, instead of, so to say, the company itself. If this premium had been paid to other persons, it would have been paid before the profits were ascertained; and the fact that it was kept by the company itself does not, in my opinion, alter its position, in considering what is to be taken in consideration in arriving at the profits.

Then, in the same way as regards the depreciation of steamers. That stands on the same basis, and must be dealt with in the same manner. The result is, that the £3500 is a sum that the persons entitled to profits are properly entitled to; but I think they are not entitled to anything in respect of the depreciation of steamers' fund or the insurance fund.

Then the point raised by the remaining question is this. The ordinary shareholders say that they ought to be recouped various sums which have, during the duration of the company, been applied out of the income in respect of what they call capital expenditure. It is conceded that no declaration can now be made; but I am asked to direct an inquiry whether any and what sums out of profits have been applied in any and what years in paying for new works, as distinguished from repairing, maintaining, and upholding existing works, and under what circumstances. I do not feel at liberty to direct any such inquiry.

I know of no line of distinction between what is, and what is not, capital expenditure. There are many sums in all companies which directors might in their discretion properly treat to some extent either as capital expenditure, or, if they please, not as capital, but as payable out of the current income of the year. The practice of companies varies in that way. In point of fact, the practice in the same company will vary from one year to another; and if the earnings of a company in any given year are small, the directors will be more disposed to attribute certain payments to capital expenditure than they would be if the income of the company for that year were five or six times as great, and they were able to declare a large dividend. If a company were declaring a dividend of 10 per cent., it would, in all probability, put many things down to current expenses which it would not do if it were only going to declare a dividend of 1 or 2 per cent.

It is impossible to lay down any rule as to what ought to be capital expenditure, and what ought not. If I were to direct such an inquiry, I should be starting an inquiry which I should not have any means of arriving at a conclusion upon, because it would be impossible for any one to say, apart from what actually has been done, in what way the directors would have exercised their discretion in each particular year. They have exercised their discretion, and have decided what is to be done in each year, and what is to be treated as expenditure out of capital, and what out of income. It has not been suggested that any of the expenditure out of income was such that it could not properly be made out of income. I am told there is one item in which it was said the question was settled between the secretary and auditor, one taking one view, and the other another. I have nothing to do with that. The accounts are passed and a final conclusion has been arrived at. Each item has been put down in the accounts as payable out of income, or out of capital; and those accounts have been accepted by the directors. I cannot come to the conclusion that they have not carefully considered them and thought them right. But whether that is so or not, what has been done must stand as it is. The tree must lie where it has fallen, and it is impossible for me to attempt

NORTH, J.
1890
In re BRIDGEWATER NAVIGATION COMPANY.

to re-open those accounts, or to say that what was in fact done was in any way imperfect or improvident.

Solicitors for the Liquidators: *Cunliffes & Davenport*, agents for *Lingards, Manchester.*

Solicitors for the Ordinary Shareholders: *Cunliffes & Davenport*, agents for *T. E. Sampson, Liverpool.*

Solicitors for the Preference Shareholders: *Burgess & Cosens*, agents for *Arthur Buckley, Manchester.*

D. P.

In re PYLE WORKS (No. 2).

STIRLING, J.

1890
Oct. 25;
Nov. 18.

Company—Borrowing Money—Loan by Bankers—Security by Promissory Notes—Credit by Railway Companies—Guarantees—Agreement—Indemnity—Mortgage of uncalled Capital—Creditors.

The memorandum and articles of association of a company empowered the directors to borrow on the uncalled capital of the company and exercise all the powers of the company, and provided that every director and other officers should be indemnified by the company from all losses incurred in the discharge of their duties. In 1882 the company being in want of money obtained permission from their bankers to overdraw the account on security being given and promissory notes being signed by two directors. That was done, it being verbally agreed that the two directors should be indemnified by a charge on the uncalled capital, and the board of directors passed a resolution that the directors who had made themselves liable should be indemnified. The notes were from time to time renewed down to February, 1889. The same two directors in May, 1886, gave guarantees to two railway companies in consideration of their giving credit for the goods carried for the company. The board of directors in April, 1886, passed a resolution that the two directors who executed guarantees to the bank, and the railway companies should be indemnified, and that a charge on the uncalled capital of the company should be given in respect of the loan of £5000 by the bank, and that a similar charge should be given in respect of the railway accounts for £1500. A mortgage dated the 3rd of May, 1886, upon the uncalled capital, was given in pursuance of that resolution. The company was in liquidation, and the mortgagees claimed to be paid what was secured to them:—

Held, that the transaction of the overdraft at the bank was in substance a borrowing of money on the security of uncalled capital within the meaning of the article, though, *semble*, the obtaining the guarantee to the railway companies was not:—

Held, also, that the articles empowered the directors to issue securities founded on uncalled capital for any legitimate business purpose of the company; that the indemnifying of directors was under the articles such a purpose; that the mortgage was valid as to both liabilities, and that the claim of the mortgagees ought to be admitted by the liquidator.

Adjourned summons.

The *Pyle Works, Limited*, was a company formed under the *Companies Acts*, 1862 and 1867, and was incorporated in 1880. The company was ordered to be wound up, and in the liquidation claims were brought in by mortgagees of uncalled capital, of which some were allowed, but the claim of *Robert McIlwraith* and *Edward Gotto*, in respect of a mortgage dated the 3rd of May,

STIRLING, J. 1890 *In re* PYLE WORKS (No. 2).

1886, in their favour, was not disposed of; more information being required as to the facts (1). That information having been supplied, the question now was whether the mortgage was valid and binding on the company.

By the memorandum of association, Clause 3 (L), one of the many objects of the company was:—"To borrow money by mortgage or otherwise, receive money on deposit, and issue transferable and other bonds, and mortgage debenture, and any other securities founded or based upon all or any of the real and personal assets or on the credit of the company." The 81st of the articles of association provided that "every director, and also every auditor, manager, secretary, and other officer, and his heirs, executors, administrators and assigns, shall be indemnified by the company from all losses and expenses incurred by them respectively in or about the discharge of their respective duties, except such as happen from their own respective wilful acts or defaults." The 102nd article was that "the business of the company shall be managed by the board, who shall, on behalf of the company, adopt and carry out the agreements mentioned in the memorandum of association, and exercise all such powers of the company as are not by Act of Parliament or by the regulations of the company for the time being in force, expressly declared to be exercisable by the company in general meeting; subject nevertheless to such regulations (not being inconsistent with the aforesaid provisions or regulations) as may be prescribed by the company in general meeting; but no regulations made by the company in general meeting shall invalidate any prior Act of the board which would have been valid if such regulation had not been made." The 106th article was that "they may let, mortgage, sell, or otherwise dispose of, either absolutely or conditionally, and in such manner, and upon such terms and conditions in all respects as they think fit, any of the property of the company, and may accept payment or satisfaction for any property so disposed of in fully paid-up or other shares, or partly in shares of the company or any other company, and partly in cash, or in any such other manner whatsoever, as they deem expedient."

(1) 44 Ch. D. 534.

The 111th article was that "They may, from time to time, borrow on bonds or debentures of the company, or on mortgage of all or any part of the property of the company, and either with or without including in any such mortgage all or any definite proportion of the capital of the company then uncalled, such sums of money as they from time to time think expedient; and the 116th article was that "they may do all such acts, enter into all such contracts and engagements, and pay, apply, and dispose of any of the moneys or property of the company, and generally act in such manner as they shall from time to time deem necessary or expedient for carrying out all or any of the objects or purposes of the company; and may also, from time to time, and either temporarily or permanently, omit, postpone, or abstain from carrying out all, or discontinue the further carrying out of any one or more of such objects as they shall from time to time, in the exercise of their discretion, deem most to the advantage of the company."

The circumstances under which the mortgage of the 3rd of May, 1886, was given, were as follows:—In 1882, the company were desirous of obtaining an overdraft from their bankers, who were willing to give the required accommodation on the security of a promissory note signed by two of the directors. At that time there were five directors, viz., *McIlwraith* and *Gotto*, the Claimants; *Robert Campbell Grant*, *John Samuel Fletcher*, and *Mark William Cave;* the last-named being now dead. It was arranged that the note should be given by *McIlwraith* and *Gotto*, and, accordingly a note, dated the 14th of April, 1882, for £2500 payable on demand, was given by them to the bankers (the *British Linen Company*). On the 28th of April, 1882, a meeting of the board was held, and the following resolutions were an extract from the minute-book of the company:—

"At a board meeting of this company, held on Friday, the 28th day of April, 1882, at 2 P.M., there were present:—

"Mr. *McIlwraith*, Mr. *Gotto*, Mr. *Fletcher* and Mr. *Grant:*

"Resolved, that under article 81" (relating to indemnity to directors and others), "the directors who have made themselves jointly responsible with the company for the sum of £2500, by a promissory note signed by Mr. *Gotto* and Mr. *McIlwraith*, be and

STIRLING, J. 1890 *In re* PYLE WORKS (No. 2).

are hereby indemnified. This promissory note having been requested by the company's bankers as the security for a loan to the company; the bank having asked a second promissory note for £2500 as a security for a further loan to the company for that sum, and Messrs. *Gotto* and *McIlwraith*, having consented to sign such note; resolved: That on their doing so, they be indemnified in respect of such liability in accordance with article 81, as above."

A second promissory note for £2500, also payable on demand was, on the 29th of April, 1882, given by them to the bankers. The two notes were renewed from time to time, the last renewals being in January and February, 1889.

On the 26th of May, 1886, *McIlwraith* and *Gotto* executed guarantees in favour of the *Great Western* and the *London and North Western Railway Companies* for sums which might become due from the *Pyle Works Company* to those railway companies; the guarantees were in the following terms:—

"*Great Western Railway.* Conditions of guarantee.

"We the undersigned *Robert McIlwraith, Rochester Buildings, Leadenhall Street*, and *Edward Gotto, The Logs, Hampstead*, two of the directors of the *Pyle Works, Limited*, do hereby guarantee and agree that, in consideration of the *Great Western Railway Company* giving credit to the *Pyle Works, Limited*: We will be personally responsible for the payment of all moneys from time to time owing by the *Pyle Works, Limited*, to the *Great Western Railway Company*, and will pay the same on demand in case of default by the said *Pyle Works, Limited*."

The guarantee was executed by those directors, and their signatures were witnessed on the 26th of May, 1886. The guarantee given to the *London and North Western Railway Company* was in a more elaborate form, and was as follows:—

"In consideration of your opening a ledger account in favour of the *Pyle Works, Limited*, for carriage of materials to be both received and forwarded over your system and other systems connected therewith, we hereby jointly and severally agree to guarantee the due payment of such account on the following conditions:"

Then followed ten conditions in reference to the carriage of

the goods including one (3) that the accounts would be made up monthly, and must be paid in full within eight days after the 12th of each month; and another (10) that in case of failure to observe any of the conditions, the credit accounts would be closed and cash payments required to be made for the future, and should the account not be paid in accordance with the conditions, the company was to have the right to detain any goods and sell them, and apply the proceeds in or towards the liquidation of the debts due. That guarantee was also executed by the same two directors, and their signatures witnessed on the 26th of May, 1886. At a meeting of the directors of the *Pyle Works Company* on the 19th of April, 1886, it was resolved "That Messrs. *McIlwraith & Gotto*, having guaranteed the loan to the company of £5000 by the *British Linen Company's Bank* be indemnified, and that a charge on the uncalled capital be given them in respect of this loan, and that they having guaranteed the *Great Western Railway Company*, and the *London and North Western Railways* ledger accounts that a similar charge be given for £1500, and it was resolved that the company's solicitors be instructed to prepare the charge, and that the company's solicitors, Messrs. *Grant & Beesley* be instructed to affix the seal of the company to the documents." The mortgage of the 3rd of May, 1886, was given in pursuance of that resolution. It contained recitals that the company had been duly incorporated with a capital of £100,000, divided into 10,000 shares of £10 each; that 6000 shares had been issued and allotted; that upon 5000 of them the sum of £6 per share, and no more, had been called up, and that the remainder of the 6000 had been paid up in full or issued as fully paid up; that a mortgage was given in January, 1882, to the *Greenwoods* on 3500 of the shares to secure the repayment to them of the sum of £2500 and interest. It then recited that the mortgagees (*McIlwraith & Gotto*) had at the request of the company guaranteed to the *British Linen Company's Bank* the repayment of a sum of £5000 advanced by the bank to the company with interest at £4 per cent., and had also at the like request guaranteed to the railway companies above mentioned, the payment of such sum as might be owing to those companies by the company, for carriage of goods upon their

STIRLING, J. 1890 *In re* PYLE WORKS (No. 2).

ledger accounts with the company, and then it recited that the guarantees were given by the said mortgagees upon the express condition that the said company should execute to them the mortgage thereinafter contained to secure them (the said mortgagees) against any loss or damage they might sustain by reason of giving the said guarantees. It was witnessed that in consideration of the premises, the company thereby covenanted with the mortgagees that the company their successors and assigns would forthwith, immediately after the mortgagees or either of them should pay any moneys under the guarantees, repay the same with interest at £4 per cent., and would otherwise indemnify them, and each of them, their heirs, &c., against all loss and damage that might be sustained by them by reason of entering into the said guarantees; and "that in further consideration of the premises the said company, as beneficial owners, do hereby assign unto the said mortgagees all the said uncalled up amounts of £4 per share on the 5000 shares of the said company."

It was an assignment by way of mortgage (but subject to a prior mortgage of the 3rd of January, 1882), of the "uncalled up amounts of £4 per share on the 5000 shares of the company"; and by way of indemnity to *McIlwraith & Gotto* against all loss and damage, by reason of their giving the guarantees mentioned in the recitals. The *Pyle Works Company* had gone into liquidation, and *McIlwraith & Gotto* had been called upon to make and had made payments of £5000 to the bankers in respect of the promissory notes, and of £1943 to the railway companies in respect of the guarantees, and they by their summons claimed the benefit of their security.

Mr. *McIlwraith*, who was chairman of the company, and largely interested in the success of its business, had since the decision in January, 1890 (1), deposed that he was willing to assist in procuring the overdraft or loan to be made if he was assured that he could be secured against loss; that he consulted the solicitors of the company as to what security could be given to the directors who should join in the guarantee, and he suggested a mortgage over the uncalled capital; that he (Mr. *McIlwraith*) explained to Mr.

(1) 44 Ch. D. 534.

Gotto that such a security could be given, and that he agreed to join in guaranteeing the overdraft or loan upon the terms of a mortgage of the uncalled capital being given them; that at a meeting of the board of directors on the 12th of April, 1882, it was resolved that an overdraft should be obtained on the note of the company and two directors, it having been previously arranged that Mr. *Gotto* and himself should be the directors executing it, on the terms of their being properly indemnified by the company, and having a security given to them over the uncalled capital to protect them against loss, and that on the 17th of April, 1882, Mr. *Gotto* and he, relying on that understanding and arrangement, executed a joint and several promissory note for £2500, payable on demand, that being the amount required in the first instance; that credit was given by the bank for the amount to the company in the ordinary current account. He further deposed that he discussed with the other directors the question of giving them security for their guarantees before they consented to give them; that in particular he suggested they should have a mortgage similar to that given to prior mortgagees, but not to include the general assets; that they all agreed that they ought to be so secured in respect of the guarantees, and that it should be executed in their favour when they required it, and that it was certainly understood by him, and he believed by Mr. *Gotto*, by the solicitors of the company, and by the other directors, that they were to be entitled to have such a proper and sufficient security given to them whenever they should ask for it, to secure them against loss under their guarantees; that they only executed the promissory notes upon that footing; and that the further overdraft, or advance of £2500, was in due course carried through in the same manner, and upon the same terms. He also deposed that he and Mr. *Gotto* were asked to give the guarantees to the railway companies in 1886, and that, having regard to the additional liability which they were then asked to undertake, they both agreed that they ought to press the company to execute to them the security which it had been understood they were to have to secure them against loss in respect of the guarantees given to the bank; that both Mr. *Gotto* and he insisted that a

STIRLING, J. 1890 *In re* PYLE WORKS (No. 2).

security should be given them over the uncalled capital, to secure them against liability under the guarantees to the railway companies, and also against the liability under which they were to the bank in respect of the two notes, and that it was only on condition of such security being given them that they consented to give the new guarantees that were asked of them; that it was thoroughly intended by them, and they believed thoroughly understood by the other members of the board, that they would only allow the guarantees to the bank to continue upon the terms of the security being given, and that, thereupon, a mortgage of the uncalled capital was given them on the 3rd of May, 1886, and on the 26th of May, 1886, Mr. *Gotto* and he signed the guarantees to the railway companies.

Mr. *Gotto* gave similar evidence, and that was confirmed by a joint affidavit of the two surviving directors, Messrs. *Grant* & *Fletcher*.

ciding 13th of January, 1890, Mr. Justice *Stirling*, after de-
uncalled the claims of the mortgagees under mortgages of
August, 188[illegible] of the 3rd of January, 1882; of the 10th of
founded, which [illegible] of the 28th of October, 1887, were well
said:—"As regard[illegible] as affirmed by the Court of Appeal (1),
appears to me to go a[illegible]rtgage of the 3rd of May, 1886, it
In re Inns of Court Hotel Manufacturing Company (2) and those which were upheld in
invalid, but I think it wou(2) and *Howard* v. *Patent Ivory*
more of the circumstances u[illegible]not say at present that it is
than is contained in the affid[illegible]sirable to know something
propose to postpone my decisi[illegible]ch the mortgage was given
this information has been furnis[illegible] before the Court; and I
The information which was req[illegible]s part of the case until
the affidavits which had been file[illegible] Court."
tioned above, the summons now ca[illegible]ving been supplied by
[illegible] four directors men-

Buckley, Q.C., and *Ashworth Jan*[illegible]gain to be heard.

The further evidence produced [illegible]*dward Gotto*:—

(1) 44 Ch. D. 534.

(3) 38 Ch[illegible]hews that there was an

[illegible] Law Rep. 6 Eq. 82.

agreement with *Gotto* and with *McIlwraith* at the time in 1882 when they gave guarantees to the bankers that the company would give them security against any loss which they might suffer, and the recitals in the indenture of mortgage of May, 1886, are that the mortgagees had at the request of the company given the guarantees upon the express condition that the company would execute such a mortgage. It is plain that the company was in want of money and anxious to obtain it, and that the bankers would lend upon the security of promissory notes being signed by two of the directors, and thereupon that security was given to the bankers, and the money advanced. That was clearly and distinctly a borrowing of a sum of money, and if the mortgage of May, 1886, had been executed at the time of the borrowing the question for consideration now could not have arisen. It is therefore confidently submitted that the mortgage of the 3rd of May, 1886, was within the powers of the directors, and that it is as valid as the mortgages which were held by the Court of Appeal in April last to be valid: *In re Pyle Works* (1); *Howard* v. *Patent Ivory Manufacturing Company* (2).

Hastings, Q.C., and *Whinney*, for *Robert McIlwraith*:—

This application to the Court ought, it is submitted, to be granted. The evidence is clear that the company was in urgent want of money. One object in Clause 3 (L) of the memorandum of association was to borrow money by mortgage or otherwise, and the directors could, under Article 102, carry out agreements mentioned in the memorandum. The 106th article gave large powers to the directors not only to mortgage, but to sell and dispose of absolutely or conditionally, as they should think fit, any of the property of the company; and the 81st article gave power to indemnify any director for any loss which might be incurred by him in the discharge of his duties. The borrowing of money from the bank, the giving of guarantees to the bank and to the railway companies, and the granting of indemnities were within the powers of the directors. Consequently when the question of giving guarantees to the railway companies arose in

(1) 44 Ch. D. 534. (2) 38 Ch. D. 156.

STIRLING, J. 1890 *In re* PYLE WORKS (No. 2).

May, 1886, for the credit balances, and *McIlwraith* and *Gotto* agreed to the arrangement, they were entitled to ask that they should be indemnified, and the directors were empowered to give them the indemnity, and they did so by executing the mortgage of May, 1886, and, looking at the evidence which has been produced, it is submitted that there ought to be a declaration that it is valid.

H. A. Giffard, Q.C., and *Haldane*, Q.C., for the liquidator:—

The original question whether upon the true construction of the memorandum and articles of association there was power in the directors to borrow money upon the security of the uncalled capital having been decided in the affirmative upon the other two summonses, the question now is whether the obtaining a loan from the bankers upon the promissory notes was within the powers of the directors. It may be contended that the guarantees would not have been given to the bankers without a security being given to the guarantors, and that the obtaining of a loan amounted to a borrowing, but that does not come within the terms of the 81st article, for which an indemnity could be given. Everything is governed by, and must be strictly confined to, the earlier part of Clause 3 (L) of the memorandum. "To borrow money by mortgage or otherwise." Was the borrowing from the bankers within any one of the articles for the general business purposes of the company?

[STIRLING, J.:—Or for carrying on the business of the company, for which some of the directors gave guarantees, and in respect of which they ask to be indemnified?]

And do the articles sanction an indemnity being given in 1886 for money which was borrowed in 1882, when the notes were first given? The liquidator does not desire to take any hostile course to the application, but asks the questions, whether the transaction was equivalent to a borrowing of money under the provisions of Article 111, and whether there was a distinct stipulation when the guarantees were given that the guarantors should have a security by way of indemnity, and it is submitted that they must be answered in the negative.

Beale, Q.C., and *T. H. Carson*, for unsecured creditors:—

Was the borrowing of money on notes within the terms of Article 111, which must be considered in connection with Article 106, and Clause 3 (L) of the memorandum. A wide and general power to mortgage the property of the company was given; but the giving of a security is a special matter. The company could borrow money on mortgage, but was this in any sense a mortgage for money borrowed? The matter ought to be dealt with strictly. Was the transaction within the powers given to the company? It was not made clear by the evidence, and could not be by merely saying that there was an understanding between the parties. It should be shewn that there was a definite agreement, a mortgage, or other document which was capable of being registered under sect. 43 of the *Companies' Act*, 1862.

If there had been an order for winding up the company prior to May, 1886, the two guarantors would have found themselves in a very different position, looking at the mere verbal understanding which existed. They stated that they were to have a mortgage when they asked for it, and that they had not a mortgage at the date of the transaction, and yet they now ask that it may be considered that, in effect, they had one when the resolution of the 28th of April, 1882, was passed. As to the advances made by the guarantors to the railway companies, they have to shew that the moneys paid were borrowed by the company. There was an arrangement with the two companies that they should give credit, and guarantees were given; but was that in any way equivalent to, or anything like a borrowing of money? If the Article 111 was to be brought in in aid of the transactions, it must be made clear that it was; but in fact they were mere guarantees given for moneys that might become due and owing from the company. The question is narrowed to this—was it a borrowing of money strictly, and nothing else under the powers given in the articles both from the bank and the railway companies? And as to the companies, it was clear that it was a running into debt and not a borrowing. The guarantors have not made out their case and the claim ought not to be allowed.

[The case of *In re German Mining Company* (1), was referred to.]

(1) 4 D. M. & G. 19.

STIRLING, J. 1890 *In re* PYLE WORKS (No. 2).

Buckley, in reply:—

There is no distinction between an overdraft and a loan: *Cunliffe, Brooks & Co.* v. *Blackburn and District Benefit Building Society* (1); whatever may have been said to the contrary in *In re Cefn Cilcen Mining Company* (2), and *Waterlow* v. *Sharp* (3). It is a borrowing of money, and the arrangement with the railway companies to give credit must be considered as a loan of the amount of the existing debt.

Sect. 43 of the *Companies Act*, 1862, has nothing to do with the matter, as it merely requires that a short description of the property charged, and the names of the lenders should be entered, and does not require the registration of any document.

[The case of *In re Anglo-Danubian Steam Navigation and Colliery Company* (4), was also referred to.]

STIRLING, J. (after stating the facts, continued):—

The validity of a charge on uncalled capital of the company given by way of security for money borrowed has been established by the decision of the Court of Appeal in *In re Pyle Works* (5). In the present case no money was borrowed from Messrs. *McIlwraith & Gotto*, and the question is whether it was within the powers of the directors to give such a security as that of the 3rd of May, 1886. First, Is it valid as an indemnity against loss on the promissory notes given to the bankers? It is to be observed that the resolution of the 28th of April, 1882, as recorded in the minutes, said nothing as to any bargain on the part of Messrs. *McIlwraith & Gotto*, for a security on the uncalled capital, or on any part of the property of the company. I apprehend, however, that evidence is admissible to shew what the real agreement was between them and the company. This would clearly be so if Messrs. *McIlwraith & Gotto* had not been directors; in that case the minute would not have been admissible against them. As they were directors the minute is admissible against them; but none the less does other evidence appear admissible though the existence of the minute is a circumstance

(1) 9 App. Cas. 857.
(2) Law Rep. 7 Eq. 88.
(3) Law Rep. 8 Eq. 501.
(4) Ibid. 20 Eq. 339.
(5) 44 Ch. D. 534.

to be considered in judging of its weight. I have carefully read the evidence given by Mr. *McIlwraith* and Mr. *Gotto*, and which was confirmed by Messrs. *Grant & Fletcher*, and observe that not one of those gentlemen was cross-examined, and I come to the conclusion that it was a term of the agreement between the company and Messrs. *McIlwraith & Gotto*, under which the promissory notes were given to the bankers, that Messrs. *McIlwraith & Gotto* should be indemnified by means of a charge on the uncalled capital of the company in accordance with the recital to that effect in the mortgage deed of the 3rd of May, 1886. That being so, and the overdraft being clearly a borrowing of money, it appears to me that the transaction was in substance a borrowing of money on the security of the uncalled capital of the company within the meaning of Article 111. It is true that the bankers from whom the money was actually borrowed were content with the personal security of the guarantors; but they as part of the same transaction stipulated for a counter-security in the shape of a charge on the uncalled capital, and I do not think that Article 111 requires the mortgages there mentioned to be given to the persons by whom the money is lent. I think, therefore, that to this extent the mortgage is valid.

Next, how does the case stand as regards the sums paid in respect of the guarantees given to the railway companies? The company did not on the security of those guarantees borrow money from the railway companies, but by means of them obtained on credit the services of the companies as carriers of goods. No authority was cited to shew that this can be treated as a borrowing of money; and on principle I have difficulty in seeing that it is. If then the validity of the mortgage depended on the applicability of Article 111, I should feel great doubt whether it could be supported. I think, however, that Clause 3 (L) of the memorandum of association empowers the company to "issue transferable, and other bonds, and mortgage, and debenture, and any other securities founded, or based upon all or any of the real and personal assets or on the credit of the company," not merely to secure the repayment of borrowed money, but generally for the purposes of the company. I think further (for the reasons given

STIRLING, J. 1890 *In re* PYLE WORKS (No. 2).

by me in my former judgment (1)) that the word "assets" in that clause is shewn by Article 111 to include uncalled capital, and consequently that the clause authorizes the issue by the company of securities founded or based upon the uncalled capital of the company. By Article 102 the directors may exercise all the powers of the company subject to any regulations prescribed by the company in general meeting. There are no such regulations which affect the issue of securities, and I think, therefore, that the directors might issue securities founded or based upon uncalled capital for any legitimate business purpose of the company. The indemnifying of a director seems to me, both under Article 81 and under Article 116, to be such a purpose, and I therefore come to the conclusion that the mortgage is valid, and that the claim under it ought to be admitted.

Solicitors: *Drake, Son, & Parton; Maples, Teesdale & Co.; Lane, Monro, Soutter, & Slack; G. M. Clements.*

(1) 44 Ch. D. 546–7.

T. F. M.

In re JOSHUA STUBBS, LIMITED. BARNEY *v.* JOSHUA STUBBS, LIMITED.

KEKEWICH, J.

1890

Dec. 3.

[1890 B. 4202.]

Company — Winding-up — Practice — Debenture-holder's Action — Receiver — Official Liquidator — Leave to continue Action — Displacing Receiver by Liquidator — Companies Act, 1862, *s.* 87 [*Revised Ed. Statutes, vol xiv., p.* 222].

It is the uniform practice of the Court, founded on convenience, in ordinary cases where a company has been ordered to be wound up, to appoint one officer to represent both the company and the secured creditors, such as debenture-holders or mortgagees; but that practice is not to be extended by appointing the official liquidator in the winding-up to be receiver in the place of a receiver appointed by the Court, before the date of the winding-up order, in a debenture-holder's action where the debentures purport to charge substantially the whole of the company's property, both present and future, including the uncalled capital for the time being.

Where, while a debenture-holder's action against a company is pending, an order is made for winding up the company, the Plaintiff is entitled to leave, under sect. 87 of the *Companies Act*, 1862, to continue his action, unless the official liquidator is able and willing to give him all he is entitled to in the action without its continuance.

JOSHUA STUBBS, Limited, was a company registered on the 11th of May, 1886, for the purpose of acquiring and carrying on the business of rolled metal manufacturers and brassfounders in *Birmingham.*

On the 19th of May, 1886, the company issued sixty mortgage debentures for £100 each to *William Abbott*, one of the vendors and managing director, in payment of the balance of his purchase money, and on the 25th of September, 1886, he transferred thirty of those debentures to the *Birmingham District and Counties Banking Company*, as security for an overdraft. Each debenture purported to be a charge on the whole of the company's undertaking and property, including its uncalled capital for the time being, but not including the company's freehold and leasehold premises. By a mortgage of the 19th of May, 1886, the freehold premises had been mortgaged to *Abbott* by way of further security for his purchase-money. In March, 1888, *Abbott* transferred his

KEKEWICH, J.

1890

In re JOSHUA STUBBS, LIMITED.

BARNEY *v.* JOSHUA STUBBS, LIMITED.

remaining thirty debentures to the bank, and he and the company transferred the mortgage to the bank, who thus became the holders of £6000 worth of debentures, and of a mortgage on the freehold premises, the debt claimed by the bank on the securities being £4127.

In August, 1890, the company issued to *Abbott* second mortgage debentures on their undertaking, but excepting the freehold and leasehold premises.

On the 30th of September, 1890, a petition was presented by a creditor for winding up the company.

On the 2nd of October, 1890, the bank and their trustee, *Thomas Barney*, in whom the securities were vested, commenced an action against the company and *Abbott* to enforce their (the Plaintiffs') security in respect of the sixty first mortgage debentures, and on the same day an order was made by consent in that action appointing a receiver.

On the 15th of October, 1890, an order was made, on the creditor's petition, for winding up the company, and subsequently a Mr. *Hill* was appointed official liquidator. It appeared that the solicitor for the bank, and also the Defendant *Abbott* and other creditors of the company, attended before the Chief Clerk upon the application for the appointment of an official liquidator, but that the solicitor for the bank took no part in the discussion, neither supporting nor objecting to the appointment of Mr. *Hill* as liquidator.

The winding-up order having the effect of staying the proceedings in their action, the bank took out a summons under sect. 87 of the *Companies Act*, 1862, for leave to proceed with the action notwithstanding the winding-up. The liquidator then served the Plaintiffs and the Defendant *Abbott* with a notice of motion, intitled in the action and in the matter of the company, that the order of the 2nd of October, 1890, appointing the receiver might be discharged, on the liquidator undertaking to keep a separate account on behalf of the debenture-holders; or, in the alternative, that the liquidator might be appointed receiver for the Plaintiffs in the place of the existing receiver. The summons and motion came on for hearing together.

It appeared that the company had two leasehold properties,

one of which was, it was said, rather a liability than an asset; while the other, valued at £500, was subject to a mortgage for £300. It was said that the general assets of the company would, with judicious management, probably realize considerably more than the claims of the debenture-holders and mortgagees, and that something would then be left for the unsecured creditors.

Warmington, Q.C., and *R. J. Parker*, for the summons:—

We ask, under sect. 87 of the *Companies Act*, 1862, that we may be allowed to continue our action, which is for the enforcement of our security.

Renshaw, Q.C., and *Ashton Cross*, for the official liquidator:—

We admit the validity of the Plaintiffs' debentures, and that they constitute a first charge on the company's property comprised in them; also that the Court can, in the exercise of its discretion, allow the action to proceed. But to do so would only lead to unnecessary expense. The company's property can be realized and the Plaintiffs' claim satisfied just as well in the winding-up as in the action: *In re David Lloyd & Co.* (1).

Then, as regards our motion, it is a well-settled practice, though there is no positive rule upon the subject, that the Court will not allow the liquidation of an insolvent company to be conducted by two separate officials, but that one alone should represent both the company and the debenture-holders or mortgagees: *Campbell* v. *Compagnie Générale de Bellegarde* (2); *In re Henry Pound, Son, & Hutchins* (3).

Warmington, Q.C., and *R. J. Parker*, for the bank:—

It is unfair to deprive a mortgagee of his right to realize his own security, and, in effect, to leave the realization in the hands of the mortgagor. We want our property appropriated for our security, and not saddled with the costs of the liquidation proceedings. There is no settled rule that a receiver appointed on behalf of the debenture-holders shall be displaced by the

(1) 6 Ch. D. 339, 343, 345. (2) 2 Ch. D. 181.
(3) 42 Ch. D. 402, 419.

KEKEWICH, J. 1890 *In re* JOSHUA STUBBS, LIMITED. BARNEY *v.* JOSHUA STUBBS, LIMITED.

liquidator: *Bartlett* v. *Northumberland Avenue Hotel Company* (1). Our litigation should not be conducted by a person not appointed at our instance, but whom we should yet have to pay.

Renshaw, in reply on the motion:—

There is no possibility of the liquidation expenses being put prior to the Plaintiffs' claim. There would be no conflict of interests, for the official liquidator would represent everybody. The appointment of a person to undertake the realization of the property of a company in liquidation is entirely a matter for the discretion of the Court; and, according to the uniform practice where there are debenture-holders or mortgagees, it exercises that discretion by appointing one officer alone, the official liquidator, to deal with the company's property, notwithstanding the rights of those secured creditors: *Tottenham* v. *Swansea Zinc Ore Company* (2). Those creditors can, in fact, obtain every remedy in the winding-up.

KEKEWICH, J.:—

I will deal with these applications separately.

The first is the summons in the debenture-holders' action, for leave to continue their action notwithstanding the winding-up order. The action for the moment is dead, and the only application the Plaintiffs can possibly make at present is for leave to continue. I see no reason why the action should not continue, and several reasons why it should. If the company, through their official liquidator, are willing to give the Plaintiffs at once (that is to say, as soon as the forms of the Court will allow) all that they are entitled to in the action, of course there would be no further cause for litigation; but the company have not absolute control of the proceedings in the action, because Mr. *Abbott* is a co-Defendant, and the Plaintiffs' security was constituted by a transfer to the Plaintiff *Barney*, as trustee for the bank, the other Plaintiffs, of the debentures which had in the first instance been issued to Mr. *Abbott*. It is quite possible that when the action is alive something of that kind may be done—that is, if *Abbott* is willing, and other parties consent to be bound; but I

(1) 53 L. T. (N.S.) 611. (2) 32 W. R. 716.

do not see that that is possible until the action is alive; and though I should certainly deprecate, and, so far as I could, prevent any useless costs, still I think the action must be put on its legs, to use a common expression, in order that justice may be done between the parties. It does not seem to me by any means to be a common case of an action by a secured creditor against the company to realize his security. There is that difference between the parties. I think, therefore, that the action must go on.

But a very much more important and difficult question is raised by the motion of the official liquidator. He seeks to discharge the receiver appointed in the action of the debenture-holders and to substitute himself; and Mr. *Renshaw* says, with perfect accuracy, that, though there is no rule, there is a uniform practice on the subject. What is that uniform practice? It is that there shall be one representative of the company in general and of the secured creditors in particular; that, inasmuch as either the same or, at any rate, very similar accounts must be taken in both proceedings—the proceedings for the liquidation of the company, and the proceedings for the ascertainment and payment of the debenture-holders—those accounts shall be taken, or watched over, by the same person, such person being an officer of the Court. So far I have no doubt that there has been a uniform practice, and it is a uniform practice founded on convenience, not, of course, to be extended to cases where its extension would do injustice, but to be adopted where it is found by experience seldom, if ever, to do injustice. If it is desired to go further and say that the uniform practice has been to appoint the liquidator receiver of the debenture-holders' securities, then I do not myself think that the practice has gone so far: certainly, within my own experience, the practice has been the other way—that a receiver for the debenture-holders has been appointed liquidator; and it is very important to notice the difference. I have recently had a case before me which has given me considerable trouble in ascertaining how the liquidator was to be paid. The liquidator had done good work, and it was everybody's wish that he should be fairly treated; but the whole of the property was swallowed up by the debenture-holders, or nearly the whole, and it was extremely difficult to find anything out of which his

KEKEWICH, J.

1890

In re JOSHUA STUBBS, LIMITED.

BARNEY *v.* JOSHUA STUBBS, LIMITED.

fair charges and remuneration as liquidator could be paid. Fortunately there was no ill-feeling. The debenture-holders were aware that the liquidator had done good work, and, there being some property applicable to the purpose, he was in the end paid. But there is considerable difficulty in some of these cases in finding means for paying the liquidator, and it is needless to say that there is a temptation, an almost irresistible temptation, on the part of the liquidator to find something out of which to pay his charges, and to take care that in the character of liquidator he is properly remunerated. That danger the Court must look into and face. Also, in regarding the cases which have laid down the rule, or, as I should rather say, have settled the uniform practice, one must not forget that the form of debentures has changed very much of late years, and that now, owing very much to the industry and ingenuity of a learned member of the profession, the debentures are made in such a form that there is nothing really left outside, and that the company itself, though not strictly so in technical language, really is mortgaged to the debenture-holders. Now, I find that is so in this very case. It may be possible, and I am told it is so, to get something outside the charge; but the charge in the debenture which is before me is on "the undertaking and all its property whatsoever and wheresoever, both real and personal, and present and future, not including freehold and leasehold property comprised in the indenture mentioned in the second condition endorsed hereon"—that may or may not be valuable—"but including the uncalled capital for the time being." Therefore, unless the security is sufficient to pay principal, interest, and costs, one sees that there is really nothing for the general creditors, and still less for the shareholders of the company. Now, why should I, under those circumstances, not leave the mortgagees in possession of their rights? Why should they not control the realization of their security and the ascertainment of the persons to whom the money is to be paid, and the proportions in which it is to be paid, and so forth? In the case cited by Mr. *Renshaw* in reply, there was a question whether some particular property was included in the mortgage or not. Here, unless something can be made out of the words of exception to

which I have called attention, but which was not urged by counsel, there is nothing really substantial at all; and therefore it seems to me it would be wrong to prevent the mortgagees from controlling the realization of the property, notwithstanding the uniform practice mentioned, and which is laid down in the case of *In re David Lloyd & Co.* (1), and the subsequent cases to which my attention has been called, and, as has been said, numerous other cases reported and unreported.

There is one circumstance which I should mention. It appears that the solicitors to the bank, one of the Plaintiffs in the action, and also Mr. *Abbott* and other creditors of the company, attended before the Chief Clerk on the appointment of the official liquidator. The bank were not there as Plaintiffs in the action, and I do not know how they could have been. They could only have been there as creditors. But they seem to have not opposed the appointment; they do not seem, in fact, to have taken any part in the proceedings; and the utmost that can be said against them is that they assented. That being so, they may find it extremely difficult to displace the official liquidator; but I do not think their conduct goes so far as to preclude them from insisting upon their own receiver in their own action.

Therefore, I must refuse the application of the official liquidator, and leave him in possession, at any rate for the present, of what he can get as official liquidator; and I must leave the receiver in possession in the action.

Solicitors: *Field, Roscoe & Co.*, agents for *Smith, Pinsent & Co., Birmingham; H. Fereday*, agent for *Reece, Harris, & Harris, Birmingham.*

(1) 6 Ch. D. 339.

G. I. F. C.

ROMER, J.

1890

Dec. 10, 11.

ATTORNEY-GENERAL *v.* EDWARDS.

[1889 A. '1560.]

Buildings in Streets—Building Line—House in course of Erection—"Front Main Wall of Building"—"On either side thereof"—"In the same Street"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 156 [*Revised Ed. Statutes, vol. xvii., p.* 568]—*Public Health* (*Buildings in Streets*) *Act*, 1888 (51 & 52 *Vict.* c. 52), *s.* 3.

In considering which is the "front main wall" of a house or building for the purposes of sect. 3 of the *Public Health* (*Buildings in Streets*) *Act*, 1888, and whether such house or building is "on either side of" or "in the same street" as a house or building in course of erection, for the purposes of the same section, all the circumstances of the case must be taken into consideration.

The building must be looked at as a whole; its character, its position, its distance from the house or building which is being erected or brought forward in alleged contravention of sect. 3, must be considered; a particular wing or other projection must not be selected, the front of which is to be treated as the "front main wall" which is to give the governing line, nor are two buildings necessarily "in the same street" for the purposes of the section, because one faces on the same road or street, or a continuation of the same road or street, as the other.

THIS was an information at the relation of the Corporation of *Bristol*, acting as the sanitary authority for the urban sanitary district of the city and county of the city of *Bristol*, claiming an injunction to restrain Sir *George Edwards* from continuing to erect two shops beyond the south front of the eastern wing of the *Blind Asylum*, which is a building standing on their western side, in contravention of sect. 3 of the *Public Health* (*Buildings in Streets*) *Act*, 1888.

The Defendant had begun to erect the two shops above-mentioned at the western end of a strip of land lately purchased by him in *Bristol*, formerly part of an estate called "*Tyndall's Park*," with a frontage of about 500 feet to *Park Row*.

Park Row is a main public thoroughfare, repairable by the inhabitants at large, vested in the relators—running eastwards towards the city from the junction of *Park Street* with *Queen's Road*, of which it forms a continuation—and is, owing to a

comparatively easy gradient, chiefly used for all heavy traffic between *Bristol* and *Clifton*.

On the north side of *Queen's Road*, opposite the junction of that road with *Park Street*, stands the *Blind Asylum*, which was erected in 1838—and which consists of a main building fronting towards the south on, but standing some 100 feet back from, *Queen's Road*—with two wings at right angles to the main building, both also projecting towards *Queen's Road*. The south front of the western wing—which forms the chapel—faces *Queen's Road*; while the south front of the eastern wing substantially faces the south side of *Park Row* immediately east of the junction. On the north side there is no distinct boundary between *Queen's Road* and *Park Row*.

The *Blind Asylum* stands in private grounds, with gates opening into *Queen's Road*. The south front of the chapel is recessed from the pavement a distance varying between 25 ft. 6 in. and 24 ft. 9 in., that of the eastern wing a distance varying between 24 ft. 9 in. and 23 ft. 6 in. Skirting the south front and the eastern side of this wing runs an area with a heavy balustrade standing about three feet above the ground.

Between the eastward side of this wing and the western end of the Defendant's property runs a private road some twenty feet wide, leading to the rear of the main building of the asylum, and opening by gates into *Park Row*—and between this road and the western side of the westernmost of the Defendant's shops is a vacant piece of land belonging to the Defendant, of a breadth at the south end of 15 ft. 5 in., and at the north end of 20 ft. The total distance between this western side and the eastern side of the wing is 57 ft. 3 in., or thereabouts.

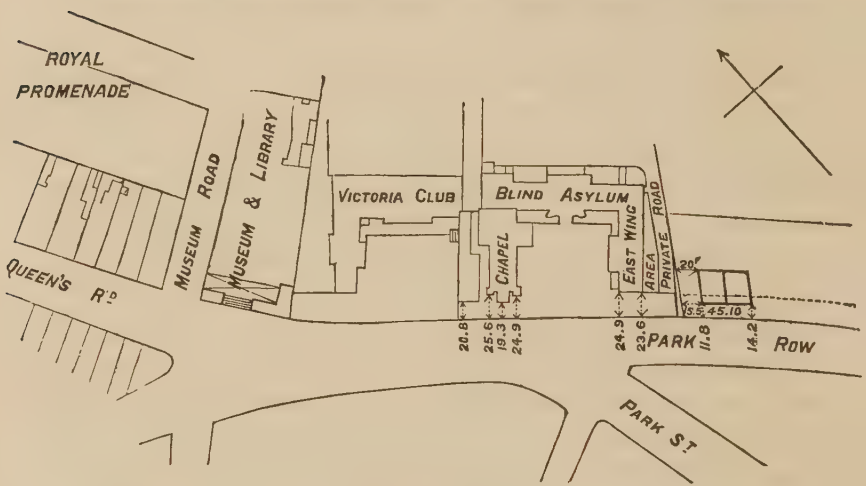
The shops erected by the Defendant have together a front of 45 ft. 10 in., which stands back from the pavement to a distance varying from 11 ft. 8 in. at the western corner of the westernmost house, to 14 ft. 2 in. at the eastern corner of the easternmost, and projects beyond the south front of the eastern wing to an extent varying from 11 ft. 2 in. to 8 ft. 8 in. at the same spots. The boundary of the building frontage at the north-west corner is slightly nearer the pavement than the front wall of the main building of the asylum.

ROMER, J.
1890
ATTORNEY-GENERAL v. EDWARDS.

A reference to the annexed plan will shew the position of the properties and the various measurements.

The Defendant had at the extreme eastern end of the property purchased by him laid out a new road, running back from *Park Row* in a north-westerly direction. The houses in *Park Row* abutting on this road on the eastern side are built right up to the pavement; and from that point eastwards the buildings on the north side of *Park Row* are practically continuous, as are also those on its south side from the junction of *Park Street* and *Queen's Road.*

To the west of the asylum stand two large blocks of buildings,



known respectively as the *Victoria Club*, and the museum and library, both fronting *Queen's Road*, but standing a little further back from the pavement than the chapel—while further to the west is a long continuous row of shops running flush with the pavement and known as the Promenade.

Before the new shops were commenced, the Defendant's architect on the 15th of June, 1889, sent in his plans to the urban sanitary authority, which plans were disapproved; and as the Defendant had meantime commenced building, the clerk of the authority served him on the 25th of October, 1889, with a notice, pursuant to the powers of the *Public Health Acts*, 1875 and 1888, that he was without the written consent of the authority erecting a building beyond the main front wall of the building on the

western side thereof, and that by continuing such erection he was rendering himself liable to penalties.

The defence raised various points, which, however, were not pressed, and the argument turned entirely on the provisions of the *Public Health* (*Buildings in Streets*) *Act*, 1888.

Philbrick, Q.C. (*Alexander Glen*, with him), for the Attorney-General:—

Sect. 156 of the *Public Health Act*, 1875, was construed by the Court as only prohibiting the bringing forward of an existing building: *Williams* v. *Wallasey Local Board* (1); but sect. 3 of the Act of 1888 (2), which repealed that section, has introduced the words "erect or"; and the Defendant has in contravention of this later Act erected buildings beyond the line of the building on the western side thereof. It is clear that *Park Row* is a "street" in the ordinary sense of the word, and also according to the definition in the Act of 1875; and it is equally clear that for the purposes of the section the asylum is in the same street as the Defendant's buildings. Further, we submit that the asylum is according to a reasonable interpretation of this Act a building "in the street"; and, that being so, that part of it next adjoining the Defendant's property gives the governing line, provided it be, as is the case here, so near the street as to be fairly within the line of street.

Haldane, Q.C., and *Chadwyck Healey*, for the Defendant:—

The question is one of construction of sect. 3 of the Act of 1888, and the Corporation must shew that this section gives them the power they claim. Their claim amounts to this, that an old building, standing by itself recessed from the road, gives the frontage line of the street for the whole extent of this vacant

(1) 16 Q. B. D. 718.

(2) 51 & 52 Vict. c. 52, s. 3: ". . . . It shall not be lawful in any urban district without the written consent of the urban authority to [erect or] bring forward any house or building [in any street] or any part [of such house or building] beyond the front [main] wall of the house or building on either side thereof [in the same street], nor to build any addition to any house or building beyond the front [main wall] of the house or building on either side of the same."

Mem.—The brackets indicate words which were not in the corresponding section of the *Public Health Act*, 1875.

ROMER, J. 1890 ATTORNEY-GENERAL v. EDWARDS.

piece of ground. If the whole of this building had been set back 100 feet, the Defendant could not without their leave have built at all; in other words, every landowner is, as regards the user of his property, at the mercy of the Corporation. We deny that the asylum is "in the same street" for the purposes of this section. "Street" is a word of flexible meaning, which is to be decided in each case according to the circumstances of that case: *Robinson* v. *Local Board of Barton* (1); and here it must mean the general line of street, as in the analogous sect. 75 of the *Metropolis Management Amendment Act*, 1862. See *Barlow* v. *Vestry of St. Mary Abbotts, Kensington* (2). The asylum cannot be fairly said to be in the street. The expression must be construed reasonably, *e.g.*, *Holland House*, although for some purposes in *Kensington High Road*, could not be said to be in that street for the purposes of this section. It must in every case be a question of degree.

Then the words "on either side thereof" must have some reasonable limitation. See *Per Fry*, L.J., in *Ravensthorpe Local Board* v. *Hinchcliffe* (3), which was followed by the Divisional Court in *Reg.* v. *Corporation of Middlesbrough* (4). Here the distance between the nearest points is 57 ft. 3 in., made up of no less than four intervening spaces.

Again, on what principle do the Corporation pick out this particular front as being the "front main wall" within that section? The section gives no clue why that front should have been picked out more than the chapel front, or the front of the main building. If the Defendant had commenced building at the eastern end of his property, he could have built right up to the pavement the whole length of his frontage, as the building line would then have been governed by the house next adjoining, which comes up to the pavement.

Philbrick, in reply:—

Although the statute must be construed reasonably, no Court can disregard its plain reading: *Ravensthorpe Local Board* v. *Hinchcliffe* and *Reg.* v. *Corporation of Middlesbrough*, are only

(1) 8 App. Cas. 798.
(2) 11 App. Cas. 257.
(3) 24 Q. B. D. 168.
(4) Not reported. See *Times*, 7 July, 1890.

illustrations, and shew that each case must be decided on its merits. *Barlow's Case* (1) and *Spackman* v. *Plumstead District Board of Works* (2) are on a different Act, with a different scope, and do not assist this case. It may be that the asylum is not a house forming part of the street within the repealed section, but it is "in the same street" within sect. 3.

The risk that a literal construction of the Act might prejudice landowners, is obviated by the fact that the urban authority can, if it think fit, sanction an alteration of the building line. The Legislature trusts that body to act reasonably—a body composed of men of the district who presumably know the wants of the district.

ROMER, J.:—

The question raised in this case is one which, to my mind, is very difficult, and as to which I feel considerable doubt. If I thought that that doubt would be likely to be removed by further consideration, I should reserve my judgment; but it does not appear to me that that would be the case, and therefore I will give judgment at once.

The short point for decision is whether the south wall of the eastern wing of the *Blind Asylum* referred to is within the meaning of sect. 3 of the *Public Health Act*, 1888, "the front main wall of the building on either side" of the Defendant's shops "in the same street." Although, as I said, I feel doubt, it is sufficient for me to say that the Plaintiff has not satisfied me that his contention is correct. And as he has not satisfied me of that, it being for him to shew that what the Defendant has done is in breach of sect. 3, this action, in my opinion, fails.

In the first place, let me consider whether this asylum is a building on the side of the Defendant's shops. In considering that, I am clearly bound to take into consideration all the circumstances of the case, and, as has been admitted, and rightly so, by the Plaintiff's counsel, in considering that asylum as a building it must be considered as a whole, and the eastern wing cannot be considered fairly apart from the rest of the building. Regarding the asylum, then, as a whole, can it be

(1) 11 App. Cas. 257. (2) 10 App. Cas. 229.

ROMER, J. 1890 ATTORNEY-GENERAL v. EDWARDS.

properly said, that within the fair meaning of sect. 3 it is a building on the side of the Defendant's shops? In my opinion, no. I have looked at the general nature of the building, its position and its distance, 57 ft. 3 in., from the nearest portion of the Defendant's shops, and the fact that it is separated from the Defendant's shops by a portion of a garden, then by a private road leading to the back of the asylum, and again by a strip of land belonging to the Defendant. Looking at all these circumstances of the case, it appears to me not to be a building on a side of the Defendant's shops within sect. 3.

Further, is it a building "in the same street" within sect. 3? Now, there is no doubt that in one sense the asylum is a building in the same street as the Defendant's shops, just as in one sense *Holland House*, that has been referred to, might be said to be in *Kensington High Road*. But is the asylum in the same street as the Defendant's shops for the purposes of sect. 3? I think not. There clearly must be some limitation (and that is admitted) to the expression "in the same street." For example, a house, although as regards its address it might be said to be in a particular street, yet if it stood in a private garden, some hundred feet from the road, could scarcely fairly be said to be in that street for the purposes of such a section as this. Taking an extreme example, I do not think that *Holland House* could be fairly said to be in *Kensington High Road* for the purposes of this section. That is no doubt an extreme case, and the difficulty here is to know where to draw a line. For example, it is reasonably clear that if a house is only separated from the street by a small strip of garden, say two feet broad, it would be difficult to contend that such a house is not in the street for the purposes of sect. 3. The difficulty here consists in the fact that the asylum is not at a long distance from the road; and it is very difficult for me to say whether within the meaning of sect. 3 it is so far from the road, and so situated, as that it may fairly be said not to be in the street for the purpose of the section. Again, for the purpose of considering whether the asylum is in the same street, it must be looked at as a whole. It cannot be said that the south wall of the east wing is only recessed a comparatively short distance from the road. That is

not the right way of looking at it. In my opinion the right way is to regard the building as a whole, and to say whether, looked at as a whole, it is in the same street. For that purpose, I look at this building. I see where the main portion of the building is situated, where its two wings are situated; I notice that it is inclosed within private grounds and surrounded by trees; that the grounds, so far as I can see, might be diverted from any public use and employed, if the owners or trustees of the asylum thought fit, as a pleasure or kitchen garden; and, looking at the building as a whole, considering its character and situation, I come to the conclusion that it cannot rightly be said to be a building in the same street as the Defendant's shops for the purposes of sect. 3.

Lastly, I am not at all satisfied that the Plaintiff is right in saying that the south front of the east wing is to be considered as the "front main wall" of the building. Again, the asylum must be looked at as a whole, and, so doing, is it right to pick out the south front of the east wing and to say that that is the front main wall which is to govern the buildings on the east of it? Why should not the west wing be looked at? Why should not the south front of the main centre part of the building? Regarding these considerations, it appears to me that the Plaintiff has not established that the south front of the east wing of the asylum is the "front main wall" of the building as a whole for the purposes of sect. 3.

In my opinion, therefore, the Plaintiff fails.

Haldane, Q.C., asked that the costs might be taxed on the higher scale.

His Lordship declined, on the ground that there was no substantial difference of fact between the parties.

Solicitors for the Attorney-General and Relators: *Robins, Burges, & Co.*, agents for *D. T. Burges, Bristol.*

Solicitors for Defendant: *Torr & Co.*, agents for *Osborne, Ward, Vassall, & Co., Bristol.*

A. C. E.

C. A.
1890
KAY, J.
Aug. 6, 7.
C. A.
Dec. 5, 6,

In re BRITANNIA FIRE ASSOCIATION.

COVENTRY'S CASE.

[1881 B. 1636.]

Company—Winding-up—Contributory—Director—Shares—Letter of Application—Nominee—Fictitious Name—Fraud—Principal—Agent—Contract—"Member of Company"—Companies Act, 1862, *s.* 23 [*Revised Ed. Statutes, vol. xiv., p.* 207].

C. sent to the directors of a company a letter of application, signed by him "for" his son, naming him, for the allotment of 200 shares. *C.* was himself one of the directors, and the application was made under an arrangement between the directors that, in order to make it appear that the whole of the share capital had been issued, the shares remaining unallotted should be issued to their nominees temporarily until applied for by the public, there being no intention that either the directors or their nominees should be under any liability in respect of such shares. Accordingly the son was registered as the holder of the 200 shares. The son, who was residing abroad, was totally unaware of the application or of the registration of the shares in his name. Nothing was ever paid on the shares, either by way of deposit, dividend, or otherwise, and no certificate of allotment was ever issued. Subsequently the company passed a resolution for a voluntary winding-up, and, both *C.* and his son having died, the son never having in any way recognised his position as shareholder, the liquidator placed *C.*'s executors upon the list of contributories in respect of the shares.

Upon a summons by the executors to have their names removed from the list:—

Held, by the Court of Appeal, that the case was governed by the ordinary law of contract; and that, although *C.* and his co-directors might have rendered themselves jointly and severally liable on the ground of fraud, yet the facts did not establish such an actual contract by *C.* to take the shares as to justify his executors being placed on the list of contributories in respect of it.

Decision of *Kay*, J., reversed.

Pugh and Sharman's Case (1), and *Cox's Case* (2), distinguished.

APPEAL from Mr. Justice *Kay*.

At a board meeting of the directors of the *Britannia Fire Association* (an insurance company incorporated in 1868 under the *Companies Acts*, 1862 and 1867), held on the 6th of May, 1869, at which *Millis Coventry*, one of the directors, was present,

(1) Law Rep. 13 Eq. 566. (2) 4 D. J. & S. 53.

a question as to dealing "with the share applications with a view to an allotment" was deferred for a week.

In the following week, on the 13th of May, 1869, the board again met, *Millis Coventry* being present, when the "share applications" were again considered, and it was resolved that the shares set forth in the allotment book to the number of 10,000 should be allotted to the several "applicants" whose names were scheduled to the resolution, the "applicants" being mere nominees of the directors, pursuant to an arrangement then agreed upon between the directors as hereinafter mentioned and which had been partially discussed at the previous board meeting. Amongst those "applicants" was "*Samuel Coventry* of *Galatz, Moldavia, Turkey*, merchant," the number of shares stated to have been applied for by him being "200," and the number allotted to him as "200." *Samuel Coventry* was accordingly registered as the holder of 200 shares. As a matter of fact up to that time there had been no application whatever for shares from "*Samuel Coventry*"; but on the 26th of May, 1869, the following letter of application for shares was sent to the board:—

"Form of Application for Shares.

"To the Directors of the *Britannia Fire Association.*

"Gentlemen,

"Having paid the sum of as a deposit of £1 per share, I request you to allot me 200 shares in the *Britannia Fire Association*, and I hereby agree to accept such shares or any less number that may be allotted to me, and I also request and authorize you to cause my name to be placed on the register of members in respect of the same.

"Name in full, for *Saml. Coventry*,
"*M. Coventry.*
"Address, *Galatz*,
"Occupation (if any), merchant.

"Date, 26 May, 1869.

"N.B.—This form with the blanks filled up should be sent to the office."

At a board meeting held on the 27th of May, 1869,—being the day following that application—at which *Millis Coventry* was again

C. A. 1890

COVENTRY'S CASE.

present, the minutes of the previous meeting were read and confirmed.

It was admitted that the form of application had been filled up by *Millis Coventry* and that the signatures were in his handwriting.

At the date of the application *Samuel Coventry* was residing at *Galatz*, where he carried on business as a grain shipper.

Nothing whatever was paid on the 200 shares either by way of deposit, dividend, or otherwise, and no certificate of the allotment of the shares was ever issued; and it appeared that *Samuel Coventry* was totally unaware of the allotment or application having been made.

Millis Coventry continued to be a director of the Association down to the 7th of March, 1881, when a resolution was passed for the voluntary winding-up of the Association, and a liquidator was appointed. The "Debtors' Call-book," which was handed to the liquidator, contained an entry to the effect that a sum of £600 was due from "*Samuel Coventry*" for "arrears of calls," in respect of the "200" shares, being in fact the whole nominal value of the shares; and against *Samuel Coventry's* name was placed the following note: "These shares were put into the name of the holder in order to facilitate the general allotment."

On the 4th of July, 1881, the liquidator sent to *Samuel Coventry* at *Galatz* a written application for payment of the £600, but no notice was taken of the application and no reply to it was ever received.

During the liquidation of the *Britannia Fire Association*, the liquidator was constantly pressing the board of the *Briton Medical and General Life Association, Limited*, who were the largest creditors of the *Britannia*, for instructions as to whether he should take any steps to recover the amounts due from shareholders of the *Britannia* to whom allotments of shares had been made in a similar manner to the allotment to *Samuel Coventry*, but eventually he was informed, by a resolution passed by the directors of the *Briton Medical* on the 18th of January, 1883, "that, in the opinion of the board, the following gentlemen, shareholders in the *Britannia Fire Association*, could successfully defend any action brought against them for payment of the calls

on their shares by the liquidator, should he take any proceedings against them or attempt to place their names on the list of contributories; and this board, as representing the principal creditors of the *Britannia Fire Association*, thinks it undesirable that such proceedings be taken." Then followed several names, including that of "*Samuel Coventry*" as the holder of "200 shares."

Millis Coventry was a director of the *Briton Medical*, and was present at the meeting when the last-mentioned resolution was passed.

Millis Coventry died in March, 1886, having made a will, and *Samuel Coventry*, in September, 1889. Subsequently, under the circumstances above stated, the liquidator placed the executors of *Millis Coventry* upon the list of contributories of the *Britannia Fire Association*, in respect of the 200 shares. The executors thereupon took out a summons to have their names struck off the list, on the ground that their testator had incurred no liability in respect of the shares, inasmuch as, although he signed the application for them, he did so as the agent for *Samuel Coventry*, and not on his own behalf, and that such shares were accordingly allotted to and registered in the name of *Samuel Coventry*.

The summons came on for hearing before Mr. Justice *Kay*, on the 6th and 7th of August, 1890.

From the evidence read at the hearing of the summons, it appeared that *Millis Coventry* and his son *Samuel* were in the habit of constantly corresponding with each other by letter, and also that *Samuel* paid his father a visit in *England* every year; but there was nothing to shew whether, by writing or in conversation, he ever authorised his father to apply for the shares in his, *Samuel's*, name. There was some slight evidence to shew that he did know—though when he first became aware of the fact did not appear—that the shares stood in his name; however, he took no notice of the matter, and no steps were ever taken by him to have his name removed from the list of shareholders. Moreover, no certificate of allotment was ever made out or sent to him; he never received any dividends on the shares; and no notices were ever sent to him from the offices of the Association on the footing of his being a shareholder until the liquidator's letter of application of the 4th of July, 1881, addressed to him

C. A. 1890

COVENTRY'S CASE.

at *Galatz*, to which he made no reply, and as to his actual receipt of which there was no evidence.

As to the circumstances under which the directors of the *Britannia Fire Association* applied for shares on behalf of nominees, it was stated by a Mr. *Webb*, a co-director with *Millis Coventry* of that association and also chairman of the board of directors of the *Briton Medical and General Life Association*, in his depositions before an examiner, that he was present at the board meeting of the 13th of May, 1869; that he recollected the manager of the *Britannia* suggesting that, as it was a pity the whole of the shares had not been applied for, applications should be made through the directors in the names of their friends for the balance; that this suggestion was somewhat discussed, and that it was distinctly stated by the manager, and as distinctly understood by the directors, that the unallotted shares should not be taken by the directors themselves, but that they were to name some friends in whose names the shares were to be placed temporarily, until the public applied for them; that at first the directors did not like the idea, but that, ultimately, in the interests of the company, they consented to it, and that thereupon *Millis Coventry* gave in his son's name for 200 shares; also that the subject of these "applications" had been mentioned at the previous board meeting of the 6th of May, 1869, the object being then known and it being understood that the applications were to be treated as a mere matter of form, *Millis Coventry* saying "he would put 200 shares in his son's name." Mr. *Webb* further stated that he was present at the board meeting of the *Briton Medical*, of the 18th of January, 1883, at which *Millis Coventry* was also present, when the question arose as to the instructions to be given to the liquidator of the *Britannia* with respect to recovering calls from the shareholders who were nominees of the directors, and that they, the directors of the *Briton Medical*, "were all of opinion that it would be a monstrous injustice that those persons who knew nothing about it should be called upon to pay, and that they could not be made to do so as they knew nothing about it, and no certificates had been issued to them. That was the opinion openly expressed at the board by the directors. I recollect that Mr. *Millis Coventry*, deceased, made a statement to

that effect:" and that accordingly the resolution of that date was unanimously passed.

Renshaw, Q.C., and *Baines*, for the summons, contended that *Millis Coventry* had no authority from his son, *Samuel*, to take the shares, and that the evidence shewed he never took nor intended to take the shares in his own name, as he expressly stated to the directors.

[They referred to *Barrett's Case* (1), and *Bird's Case* (2).]

[KAY, J., referred to *Williams' Case* (3), and *In re London, Bombay and Mediterranean Bank* (4).]

Marten, Q.C., and *Beddall*, for the official liquidator, contended that *Millis Coventry* having, in effect, given in a dummy name as shareholder, he himself became liable for the shares.

[They referred to *Cox's Case* (5), and *Barrett's Case*.]

Renshaw, in reply.

KAY, J.:—

I must say that human affairs are wonderfully like a kaleidoscope with its combinations of colours constantly changing. Among the large number of reported cases in which persons have been put upon the list of contributories of companies none are to be found in which the facts are exactly the same as those in the present case. [His Lordship then stated the facts, and continued:—] Now, if *Samuel Coventry* assented to his name being put on the register, he would have had no ground for its removal, because he would have been trustee for his father. If a man applies for shares in the name of a nominee, that is a perfectly good transaction, and the nominee, although only a trustee, and not the nominor, is the shareholder. But if a man applies for shares hands in a false name, or the name of some one who knows nothing about the application, or the name of an infant, who cannot be made responsible—a dummy name instead of his own—the Court treats that man as the real shareholder and the name

(1) 4 D. J. & S. 416.
(2) Ibid. 200.
(3) 1 Ch. D. 576.
(4) 18 Ch. D. 581, 586.
(5) 4 D. J. & S. 53.

C. A. 1890 COVENTRY'S CASE. Kay, J.

handed in as a dummy name, and the Court does not absolve him from liability. Here *Millis Coventry* applied for shares in the name of his son; but, according to the evidence of Mr. *Webb*, I have his own admission that in 1883 the son knew nothing about it. Therefore *Millis Coventry* was the proper contributory, and not his son *Samuel*. Unfortunately, both are dead, and I have to make out the rights of the parties from such evidence as is before me. But the Court has the power of drawing inferences. The resolution passed at the meeting of the *Briton Medical and General Life Association*, at which *Millis Coventry* was present, was a perfect admission by *Millis Coventry*, corroborated by *Webb*, that *Samuel* knew nothing about the application for shares. *Samuel*, therefore, clearly was not a shareholder. It seems to me impossible after this formal application and allotment to deny that his father was, without overruling *Cox's Case* (1). Therefore *Millis Coventry's* executors were properly put on the list, and the summons must be refused with costs.

C. A.

From that decision *Millis Coventry's* executors appealed. The appeal was heard on the 5th and 6th of December, 1890.

Renshaw, Q.C., *Bray*, and *Baines*, for the Appellants:—

The only authorities cited against us in the Court below were *Cox's Case* and *Barrett's Case* (2); but neither of them applies to the present case. There the shares were actually taken by the applicant, but here there was no intention on the part of *Millis Coventry* to take the shares, either for himself or for his son, as his co-directors well knew, for it was expressly part of the arrangement under which the several directors were to hand in the names of nominees for the unallotted shares that none of the directors were to be responsible for such shares. It was merely a device adopted for the purpose of inducing the public to believe that the company's capital had been largely subscribed for. This case is governed by the ordinary law of contract, our contention being that there never was any contract entered into binding *Millis Coventry* to take these shares, either for himself or as agent: *Lewis* v. *Nicholson* (3); *Ex parte Panmure* (4); *Collen* v.

(1) 4 D. J. & S. 53.
(2) Ibid. 416.
(3) 18 Q. B. 503.
(4) 24 Ch. D. 367.

Wright (1); *Lindley* on Companies (2). *Kelner* v. *Baxter* (3), where it was held that a person purporting to contract "as agent," but having in fact no principal, was himself liable on the contract, is opposed to the authorities previously cited, which seem to shew that he can be liable in damages only and not on the contract. However, in the present case, as the evidence shews, there was really no contract at all, and so all the directors understood at the time.

Marten, Q.C., and *Beddall*, for the liquidator:—

We say that, on the evidence, there was an intention that these shares should be taken, although a fictitious or dummy name was handed in; and the real shareholder is the person who handed in that name: *Pugh and Sharman's Case* (4); *Richardson's Case* (5). As a director *Millis Coventry* was estopped from saying he never intended to take the shares or to enter into a contract.

The Appellants' counsel were only called upon to reply on the question of costs.

Renshaw, in reply:—

We desire to leave the question of costs to the Court.

LINDLEY, L.J.:—

This is an appeal from a decision of Mr. Justice *Kay*, refusing to remove from the list of contributories of this company the names of the executors of *Millis Coventry*, who appears to have been a director of the company from the time of its formation until its voluntary winding-up. He had as a co-director a Mr. *Webb*, who has made a deposition in this case, and whose evidence shews what was being done as regards the matter now in question.

The company was formed some time before May, 1869; and it appears that in that month of May, 1869, the shares of the company had not been taken up to an extent which the directors thought expedient and desirable; accordingly they proceeded to

(1) 7 E. & B. 301; 8 E. & B. 647.
(2) 5th Ed., p. 241.
(3) Law Rep. 2 C. P. 174.
(4) Ibid. 13 Eq. 566.
(5) Law Rep. 19 Eq. 588.

C. A. 1890 COVENTRY'S CASE. Lindley, L.J.

consider how the issue of shares might be increased. Mr. *Webb's* evidence shews what was done, and that in fact a fraud was committed by the directors. Not having succeeded in getting off the shares, and having in hand a number of unallotted shares, they wanted to make it appear as if those unallotted shares had been allotted; and, accordingly, they put several hundreds of them into the names of their private friends without any authority at all. The object of that is disclosed by the evidence, namely, to make it appear that shares which were in truth unallotted had in fact been allotted; the directors apparently thinking that the shares would be more easily disposed of by transfer. That was a gross fraud; and it seems to me that the directors who took part in it were jointly and severally responsible. Two hundred shares were allotted in the name of *Samuel Coventry*. The application for them was signed by *Millis Coventry*, and the address of the apparent applicant was given as "*Galatz*," where *Samuel Coventry* lived. Now Mr. *Webb* says, not that it was agreed that the directors should take shares, but that they should not take shares—a circumstance which distinguishes the case from *Pugh and Sharman's Case* (1) and *Cox's Case* (2). This is not a case of *A.* agreeing to take shares for *B.*, but of *A.* committing a fraud, and not taking shares for himself or anyone else. Now, can we say that there was, upon the facts, any agreement by *Millis Coventry* to take shares so as to bring the case within *Cox's Case*, and that class of cases? I cannot say that. But unless the evidence warrants us in coming to the conclusion that *Millis* agreed to take these shares, we cannot put him on the list. We must not strain the facts in order to find an agreement where none exists. Looking at the facts as they appear upon the evidence, we cannot say that, according to legal principles, his name, or rather the names of his representatives, should remain on the list of contributories; and, therefore, they must come off. The facts are plain, and do not justify the names being allowed to remain on. We must allow the appeal, and the order of Mr. Justice *Kay* must be discharged; but, having regard to the nature of the transaction, we think that the Appellants ought to have no costs either here or below.

(1) Law Rep. 13 Eq. 566. (2) 4 D. J. & S. 53.

BOWEN, L.J.:—

I am of the same opinion. It is a question of contract or no contract; and the law which governs this case is the ordinary common law as to contracts. Sect. 23 of the *Companies Act*, 1862, says that every person who has agreed to become a member of a company, and whose name is entered on the register of members, shall be deemed to be a member of the company; but we do not really require that section to tell us that the law of contract is the law we have to apply.

Now, what is the position of the liquidator in this case? In order to settle the names of the executors of *Millis Coventry* upon the list of contributories he has to make out a contract, not between *Samuel Coventry* and the company, but between *Millis Coventry* and the company. But here *Millis Coventry* had no intention whatever of taking or holding the 200 shares, and no one ever supposed he had. The truth is, that it was intended that *Millis* should not be a shareholder, but that *Samuel* should appear to be a shareholder in order that the public might be induced to buy shares. That the *Companies Act* provides a remedy in such a case as this I have no doubt; moreover, I am by no means sure—although I will not decide the point until it has been argued—that there is not some evidence here of a criminal conspiracy indictable at law; but the remedy actually adopted has, in my opinion, been misconceived. An agent who has no authority, and who nevertheless represents that he is authorized to act as agent, is answerable to those who are deceived by him for the breach of an implied warranty. That is laid down by *Collen* v. *Wright* (1). That there may have been in the present case a cause of action on that ground against *Millis Coventry*, is possible. I say nothing as to the question whether it has been lost by lapse of time or otherwise. But here there was no intention to take the shares, nor any other intention than that *Samuel Coventry* should appear to the world to be a shareholder. In my opinion, the order should be discharged, but without costs, since a fraud seems to have been committed.

(1) 7 E. & B. 301; 8 E. & B. 647.

C. A. 1890 COVENTRY'S CASE.

FRY, L.J.:—

I also find myself unable to come to the same conclusion as the learned Judge below. The question is, whether or not a contract has been entered into by *Millis Coventry* with regard to the 200 shares. The evidence of *Webb*, his co-director, to my mind, conclusively shews that there was no such contract. *Webb* expressly states that the intention of the directors was that they should not take any of the unallotted shares. In my opinion, there was no real contract at all by any of the directors to take these shares; all they agreed to do was to go through a sham procedure, in order to make it apparent to the public that certain persons who had not contracted for shares had contracted for shares, and so the name of *Samuel Coventry* was entered on the list of shareholders. There was no real intention on the part either of *Millis Coventry* or of *Samuel Coventry* to take shares; but the public were to be induced to believe that they, or one of them, had taken shares. There was no contract with the company. A contract arises from the intention of two minds directed towards a common object, itself indicated by certain terms. Here there was no intention by either party, the company or *Millis Coventry*, that he should bind himself to take shares; it was a sham transaction, a *fabula acta*, by means of which the public were to be deceived. I agree with what has been said by the other Lords Justices as to the nature of the transaction so far as it appears before us: whether, if *Samuel Coventry* had been alive, he could have given some explanation, it is impossible to say. The order of the Court below must be discharged; but, having regard to the nature of the transaction, there should certainly be no costs.

Solicitors: *Watney, Tilleard, & Freeman; A. J. Nash.*

G. I. F. C.

In re ALABAMA, NEW ORLEANS, TEXAS AND PACIFIC JUNCTION RAILWAY COMPANY.

C. A.
1890
NORTH, J.
Nov. 1, 8, 13.
C. A.
Dec. 16, 17, 18.

Company—Winding up—Arrangement with Creditors—Sanction of Court—Jurisdiction — Debenture-holders — Scheme depriving Creditors of their Security—Joint Stock Companies Arrangement Act, 1870 (33 & 34 *Vict. c.* 104), *s.* 2 [*Revised Ed. Statutes, vol. xvi., p.* 547].

The power given by the *Joint Stock Companies Arrangement Act*, 1870, *sect.* 2, to sanction a scheme of arrangement between a company in liquidation and its creditors extends to debenture-holders and other secured creditors, and enables the Court to sanction a scheme, although it deprives debenture-holders of their security wholly or in part.

In re Empire Mining Company (1) approved.

In exercising the power of sanctioning a scheme of arrangement conferred on it by the Act, the Court will not only ascertain that all the statutory conditions have been complied with, but will also consider whether the class of creditors summoned to the meeting was fairly represented by those who attended, and whether the statutory majority who approved of the scheme were acting *bonâ fide* or were seeking to promote interests adverse to those of the class whom they professed to represent, and generally whether the arrangement is such as a man of business would reasonably approve.

The decision of *North*, J., affirmed.

THIS was a petition under sect. 2 of the *Joint Stock Companies Arrangement Act*, 1870, to obtain the sanction of the Court to a proposed arrangement or compromise between the above company and its creditors.

The company was being wound up voluntarily under the supervision of the Court, and the petition was presented by the liquidator.

The company was registered in 1881 under the *Joint Stock Companies Acts* as a company limited by shares, its object being the acquiring and holding the shares and securities of certain American railroad companies carrying on business in the *United States of America*.

The capital of the company was £4,200,000, divided into 20,000 preference shares of £10 each, which had not been issued;

(1) 44 Ch. D. 402.

C. A. 1890 *In re* Alabama, New Orleans, Texas and Pacific Junction Railway Co.

150,000 preferred or A shares of £10 each, and 250,000 deferred or B shares of £10 each. The whole of the A and B shares had been issued and paid up in full.

The company had issued two sets of debentures. The first set, called First Debentures, were nominally for £1,500,000. They bore interest at the rate of 6 per cent. per annum, and constituted a first charge upon the whole of the company's assets and undertaking. The second set, called Second Debentures, were nominally for £500,000. They also bore interest at 6 per cent., and constituted a second charge (subject to the first debentures) on the whole of the assets and undertaking of the company. The company had also agreed to seal and deliver debentures ranking equally with the second debentures, for sums amounting to £191,557. These debentures formed part of an intended issue of £200,000, but up to the date of the presentation of this petition the last-mentioned debentures had not been actually sealed or delivered, and the persons who were entitled to delivery thereof held only scrip, which it was intended should be exchanged for definitive debentures. The principal of all the debentures was payable in the year 1907.

In the year 1885 the company were unable to pay in full the interest on the first debentures, and by arrangement with the holders the company issued to them certificates to bearer, representing a part of the interest, and, in order to provide for the payment of these certificates it was agreed that second debentures for £30,000 should be lodged with trustees, upon trust to sell the same and to apply the proceeds in payment of the certificates; and scrip, exchangeable for second debentures to the value of £30,000 (included in the above-mentioned £191,557), was accordingly lodged with trustees.

In September, 1887, the company passed a resolution to wind up voluntarily, and the petitioner was appointed liquidator, and on the 29th of October, 1887, an order was made to continue the winding-up under the supervision of the Court.

At the date of the resolution there had been issued and were still outstanding £1,497,700 of the first debentures, and some arrears of interest were due thereon; £482,200 of the second debentures and some arrears of interest thereon; £191,557 scrip

exchangeable for second debentures; and certificates for £28,494 charged upon scrip deposited; and the unsecured debts of the company amounted to about £3,999 13*s.* 8*d.*

On the 25th of August, 1887, *Charles Morrison*, a holder of first and second debentures, commenced an action, on behalf of himself and all other holders of first and second debentures, against the company, for the administration of the trusts of the deed by which the first debentures were secured. In this action an order was made on the 29th of September, 1887, appointing the present petitioner receiver of the property charged by the first debentures and manager of the company's business.

The company's property comprised shares and securities of four American railroad companies, and the scheme of the company was to acquire and hold so much of the shares and securities of those four companies as would give the company the virtual control of the four companies, and in that manner to ensure that the four companies (the lines of which, together with another railway, formed one system of railway) should be conducted in the manner best calculated to promote the interests of all.

The petition stated that, should the above-named American railroads be worked independently, or in connection with a competing railway, the value of the company's property would be to a great extent destroyed, and consequently any attempt to sell the shares and obligations of those companies in the ordinary way would seriously damage the security of the debenture-holders; the value of the securities depending to a great extent on the combination between the American companies, brought about by the control exercised by this company, the securities, if sold separately, would fetch a comparatively small sum, and the only way in which any reasonable value for the securities could be obtained would be by a sale of the whole to some person or persons desiring to continue the scheme of the company, and it would be exceedingly difficult, if not altogether impossible, to effect such a sale.

In consequence of the impracticability of a sale piecemeal of those shares and obligations, some of the large debenture-holders proposed to the liquidator that some arrangement should be come to by which the company's affairs might be taken out of

C. A. 1890

In re Alabama, New Orleans, Texas and Pacific Junction Railway Co.

liquidation, and ultimately it was decided to submit to the shareholders and creditors of the company the following scheme:—

"Suggested Plan of Re-arrangement of the Debenture Debt of the Company.

"1. The present debenture debt is as follows:—

"£1,500,000 6 per cent. First Debentures, the arrears of interest on which (calculated to the 31st of October, 1890) amount to £21 10*s.* per cent.

"£700,000 6 per cent. Second Debentures, the arrears of interest on which (calculated to the 30th of September, 1890) amount to 20 per cent.

It is proposed to create—

"(*a.*) £750,000, 5 per cent. A debentures, repayable on the 1st of November, 1940, but redeemable at the option of the company after the year 1910, upon six months' notice, at the price of 115 per cent., interest to run from the 1st of November, 1890, and to be payable half-yearly on the 1st of May and the 1st of November; but, until the 1st of November, 1895, interest to be payable only out of profits, and in the event of deficiency such interest to accumulate, the debenture-holders having no rights of foreclosure or other action until the 1st of November, 1895.

"(*b.*) £1,050,000, 5 per cent. B debentures, principal secured as a second charge ranking next after the A debentures, and repayable on the 1st of November, 1940, but redeemable in the same manner and at the same rate as the A debentures. Interest to run from the 1st of November, 1890, and to be payable half-yearly on the 1st of May and the 1st of November out of profits only, after provision has been made for interest on the A debentures.

"(*c.*) £840,000, 5 per cent. C debentures, principal secured as a third charge and repayable on the 1st of November, 1940, but redeemable at the option of the company at any time before that date at par, on six months' notice, interest to run from the 1st of October, 1890, payable half-yearly on the 1st of April and the 1st of October, out of profits only, after provision has been made for the A and B debentures.

"The interest on the B and C debentures not to be cumulative. Any deficiency in respect of the first half-yearly coupon in any

year on B and C debentures to be made good on the second half-yearly coupon of such year, provided that the profits for the twelve months covered by such two coupons are sufficient for that purpose.

"2. The exchange and conversion to be made on the following basis:—

"The outstanding first debentures, together with all coupons from the 1st of October, 1887, inclusive, to be surrendered to the company, and, in exchange for each £100 debenture with such coupons, the holder to receive (1.) Fifty pounds nominal of new A debentures; (2.) Seventy pounds nominal of new B debentures; and (3.) One pound ten shillings in cash, being together equal to the face value of the surrendered debentures and interest up to the 31st of October, 1890.

"3. The outstanding second debentures, together with all coupons from the 1st of December, 1887, inclusive, to be surrendered to the company, and, in exchange for each £100 debenture with such coupons, the holder to receive £120 nominal of new C debentures, being the equivalent amount of the principal of the old debentures and interest up to the 30th of September, 1890.

"4. Creditors of the company holding first or second debentures of the existing issues as security for debts to take over such securities, and release the company from all claims in respect of principal and interest of the debts, the securities taken over to be exchanged for new securities upon the terms of this plan.

"5. Unsecured creditors to accept new C debentures at par for the amount of the principal of their debts, and to release the company from all claims for principal and interest.

"6. The action now pending of *Morrison* v. *Railway Share Trust Company, Limited, and Others* to be stayed by consent, and the receiver discharged, the company paying the costs of all parties, as between solicitor and client.

"7. The pending liquidation to be stayed, and the liquidator to be discharged, the receiver and liquidator to hand over the assets to the company.

"8. It shall be part of this plan that the new directors of the company, when it is taken out of liquidation, shall be nominated

C. A. 1890 *In re* ALABAMA, NEW ORLEANS, TEXAS AND PACIFIC JUNCTION RAILWAY CO.

by the First debenture-holders in general meeting, with a view to their being elected by the shareholders in due course.

"9. Prior to the issue of the new debentures the articles of association of the company to be altered, so as to provide that, whilst the full amount of interest due upon the B and C debentures is at any time unpaid, no person is to be eligible to serve as a director of the company, unless, prior to his appointment, election and re-election, as the case may be, his name shall have been submitted to and approved in writing by a trustee or trustees to be nominated on behalf of the B and C debenture-holders, or, in default of such approval, then by a meeting of such debenture holders to be convened for the purpose.

"10. All details in connection with the carrying out of the above plan to be settled by the receiver."

In pursuance of an order made by Mr. Justice *North* on the the 23rd of September, 1890, the liquidator convened four meetings, viz.:—

(*a.*) An extraordinary meeting of the shareholders of the company.

(*b.*) A meeting of the holders of first debentures.

(*c.*) A meeting of the holders of second debentures, including holders of scrip representing second debentures, and holders of interest certificates secured by the deposit of scrip.

(*d.*) A meeting of the unsecured creditors of the company.

The proposed arrangement was submitted to each of these meetings, and was unanimously approved at the meetings of shareholders, of second debenture-holders, and of unsecured creditors respectively, and was approved at the meeting of first debenture-holders by a large majority in number, representing considerably more than three-fourths in value of the first debenture-holders present in person or by proxy.

The Petitioner asked that the proposed arrangement might be sanctioned by the Court, so as to become binding on all the creditors and contributories of the company, and upon the Petitioner as liquidator thereof.

Upon the hearing of the petition holders of second debentures to the amount of £465,000 appeared in support of it, and none appeared to oppose it.

The petition was also supported by holders of first debentures to the amount of £580,000, of whom holders to the amount of £330,000 at least did not hold any second debentures. Some of the others held also second debentures, but it did not appear to what extent. The petition was opposed by two holders of first debentures, who respectively moved and seconded an amendment at the meeting of the first debenture-holders; each of them holding first debentures to the amount of £10,000.

No shareholders or unsecured creditors of the company appeared.

The petition came on for hearing before Mr. Justice *North*, on the 1st of November, 1890.

Sir *H. Davey*, Q.C., and *A. R. Kirby*, for the Petitioner:—

Under the proposed arrangement the holders of the first debentures will still retain a first charge on the company's assets. It may well be more worth their while to accept interest at 5 per cent., the payment of which is reasonably certain, than to insist on their interest at 6 per cent., the payment of which is very doubtful. The Court cannot inquire into the motives of the majority; a man who holds second debentures as well as first is entitled to form his opinion upon any grounds he pleases, and to vote as he likes. He cannot be disfranchised in his character of a holder of first debentures merely because he happens also to hold second debentures.

[*Cozens-Hardy*, Q.C., for the two dissentient debenture holders. I take the objection that, under this Act, the Court has no jurisdiction to sanction an arrangement which deprives a secured creditor of his security. A mortgagee is outside the liquidation. I cannot argue the point now, because your Lordship's decision in *In re Empire Mining Company* (1) is adverse to it. But I wish to be able to raise the point hereafter.]

The question then is one of expediency; and, under the circumstances, the proposed arrangement is one which the Court should sanction.

Swinfen Eady, for holders of first and second debentures, supported the petition.

(1) 44 Ch. D. 402.

C. A.
1890
In re ALABAMA, NEW ORLEANS, TEXAS AND PACIFIC JUNCTION RAILWAY CO.

F. C. Norton, for other debenture-holders, also supported the petition.

Eve, for the Plaintiff in the action, supported the petition.

Cozens-Hardy, Q.C., and *Levett*, for the dissentient debenture-holders:—

In re Empire Mining Company (1) shews that the Court will not sanction such an arrangement, unless it is fair and equitable to all the persons interested. The present scheme is not fair to the holders of first debentures; it is manifestly for the benefit of the holders of second debentures.

[The nature of the objections raised to the scheme appears in the judgment of the Court, and it is, therefore, unnecessary to state them here.]

The Court will not allow a majority, who have ulterior objects in view, to force on the minority a scheme which can only benefit the majority.

Sir *H. Davey*, in reply:—

The principle of the Act is, that the creditors are the best judges of their own interests; and, subject to the sanction of the Court, the wishes of the majority are to prevail. There is nothing unfair in the proposed scheme.

1890. Nov. 13. NORTH, J. (after stating the facts, continued):—

Several objections have been taken to the proposed arrangement. It is necessary to obtain the sanction of the Court, and the persons who have appeared to object have a right to do so. Three objections have been taken. The first is this. It is said that at present the first debentures carry cumulative interest at 6 per cent., and the holders have a charge for the whole amount of the principal and the arrears of interest upon all the assets of the company. That is quite true. Then it is said that the evidence shews that the income of the company for the present year and next year (taking for granted that the income of next year will be as much as that of the present year) will yield sufficient to pay the holders of the first debentures, if it

(1) 44 Ch. D. 402.

were divided among them, 4½ per cent. in cash, instead of the 1½ per cent. in cash which it is proposed to pay them, and the result will be, if the scheme is carried out and the contemplated income is received, that next year, after paying the interest upon all the first debentures, and paying the £1 10*s.* in cash in respect of arrears of interest, there will be a surplus of something like £30,000, which would be available, if the scheme was not approved of, to satisfy to that extent the claims of the first debenture-holders for their arrears. That is certainly an exaggerated statement, for this reason. It is accurate, so far as it goes, if the hypothesis upon which it is based should prove to be correct; but there are certain *per contras* which have been left out of sight. In the first place, as the liquidator pointed out in some circulars which he issued before the meetings took place, there is a considerable amount of costs to be provided for, the costs of the winding up so long as it has been going on, the costs of the appointment of the receiver, and other expenses of the liquidation. All these will have to be provided for, and they must amount to a very considerable sum. Moreover, the official liquidator, or whoever has the control of the company, cannot apply absolutely all the money he receives in paying the debenture-holders, keeping nothing in hand in order to satisfy the growing interest on the first debentures. It would be necessary to keep some part of the assets in hand to provide for that growing interest, in case, at the dates at which the payments should become due, the sums receivable as income might not be yet in hand. I quite assent to that view. But, although I am satisfied that the estimate of £30,000 surplus is a great deal too large, I think, so far as I am able to form an opinion upon the subject, that there would be some surplus left, which would, under the scheme as proposed, go to the holders of second debentures, and not to the holders of first debentures.

The second objection taken is this. The interest on the first debentures is to be reduced from 6 per cent. to 5 per cent., and the interest on the A debentures is, until 1895, to be payable only out of profits, and during that period the remedies of the debenture-holders by foreclosure and otherwise are to be suspended. Moreover, the interest on the B debentures is to be

C. A. 1890

In re ALABAMA, NEW ORLEANS, TEXAS AND PACIFIC JUNCTION RAILWAY CO.

North, J.

payable out of the profits of the year only, and not to be cumulative. It is said that the result of this will be to make the substituted securities under the scheme very inferior to the security which the holders of first debentures have now. But there is a *per contrà* to this, which has not been taken into consideration, namely, that the holders of the first debentures are under the scheme to receive security for the arrears of interest due to them, and those arrears of interest will, for the future, carry interest.

The third objection is, that the payment of the capital is postponed till the year 1940. That certainly seems a long time, but it must be remembered that, when the debentures were issued, it was contemplated that the capital would be repaid in the year 1907; so that from the first it was intended that the payment of capital should be postponed for a great many years. Of course payment in 1907 and payment in 1940 are very different things; but it is not a case in which a long deferred payment is to be substituted for immediate payment or anything like immediate payment. Sir *Horace Davey*, who appeared for the official liquidator, who of course takes no part in the contest, but who is bound to bring before the Court the views with which the scheme has been prepared, compares this to a conversion of debentures into debenture stock. That would involve a postponement of the payment of capital for ever, instead of to 1940 only. Therefore, to treat the new debentures as equivalent to debenture stock is a mode of stating the case rather unfavourable to the views of those who support the scheme. But, assuming that to be a fair comparison, would that of itself be a fatal objection to the scheme? I think not, and for this reason. I find that in several previous cases something very similar to this has been sanctioned by the Court, viz., creditors, who under the existing state of things were entitled to receive payment, have been compelled to accept shares or debentures in substitution for that right, by which their right to receive payment of the principal was taken away altogether. The first case of the kind was *Slater* v. *Darlaston Steel and Iron Company* (1), in which Sir *George Jessel*, M.R., held that creditors of

(1) W. N. (1877), pp. 139, 165.

C. A. 1890 *In re* Alabama, New Orleans, Texas and Pacific Junction Railway Co. North, J.

a company, including debenture-holders, could be compelled to accept paid-up shares in a new company in satisfaction of their debts. They need not of course take the shares unless they chose; but it was held that the debenture-holders were bound by the proposal to give them paid-up shares instead of debentures when the scheme had been carried by the proper majorities.

Again, Mr. Justice *Chitty*, in *In re North Western, &c., Company* (1), and I myself in *In re Empire Mining Company* (2), held that debenture-holders could be compelled to give up their debentures in exchange for fully paid-up shares. Therefore it is within the power of the Court under the Act to sanction the postponement of the payment of the principal for a long time, or even, according to those cases, to postpone it for ever.

A further point appears to have been taken by the dissentient debenture-holders, though it was not suggested by counsel at the Bar, that what they call the "junior securities," meaning those who stand later than themselves—the second debenture-holders, the unsecured creditors, and the shareholders—are not called upon to make an adequate sacrifice. I do not quite see what the holders of the first debentures have to do with those who are behind them, except so far as their position bears on the consideration whether there was good faith in the passing of the resolutions. But the suggestion is not correct to begin with, because the payment of the second debentures is to be postponed until 1940, exactly in the same way as the payment of the first debentures, and the interest in their case also is to be paid out of the profits of the year only, and is not to be cumulative.

These being the objections to the proposed scheme, certain reasons are given on the other hand why it should be sanctioned. In the first place, it is said that the liquidation will be closed, and the result of that will be that the expenses of liquidation will be entirely brought to an end, and the money which now goes in costs (and it must be a considerable sum), will be available to pay the creditors of the company. In the next place, as the liquidator pointed out in his circular, "Liquidation and a receivership always surround a property with discredit," and in

(1) *Palmer's* Co. Prec., 3rd Ed., p. 603. (2) 44 Ch. D. 402.

C. A. 1890

In re ALABAMA, NEW ORLEANS, TEXAS AND PACIFIC JUNCTION RAILWAY CO.

North, J.

the speech which he made to the first debenture-holders at their meeting, he said again, "There is no doubt that great discredit attaches to the securities of any company situated as ours is." It is notorious, I think, that the securities of a company which is in the course of winding-up do not stand in the same position as the securities of a company which is carrying on its own business.

Then, it is said, it should be borne in mind that the proposal is, that, when the company is taken out of liquidation, there shall be new directors to carry on the business, who are to be appointed by the first debenture-holders. We must recollect what the existing state of things is. The Court has, through its officer, the official liquidator, the management of the company. The company has the management or control of four American companies, and those four companies have the management of four railways, which are carrying on their business in *America*, and there is a fifth company apparently more or less under their influence. It is obviously infinitely more to the advantage of every one who is interested in the company that, instead of the Court of Chancery continuing to manage it, as it is driven to do under the existing state of things, the company should be managed by its own directors, persons selected as competent for the purpose, and nominated in the first instance by the first debenture-holders. It seems to me obvious that this would be a very great advantage, and that, therefore, the suspension of the liquidation would be very beneficial to everybody who is interested in the company.

The next thing said is, that the debenture-holders will have a marketable security, instead of a security which is very much depreciated in value. And with respect to this, the liquidator in his speech said: "There is no doubt, also, that the holders of bonds suffer considerable hardship, inasmuch as, not only do the securities stand at a depreciated and low price, but the holders are unable to use them with their bankers, or in any other way. I am told that the interest should not be reduced from 6 to 5; but, gentlemen, a really safe 5 per cent. bond is worth more than a speculative 6 per cent., and, if I had put it at 6 per cent., having only a certain amount of revenue to deal with, I should

have had to reduce the capital sum of the first mortgage, which would, I think, have hurt you more than the reduction of interest. I have added all the arrears of the interest to the B debentures, which increases your capital in those by 20 per cent., and I think myself that, in a very short time, you will find those securities stand at a price in the market which will make your holding of much greater value than it is at the present time. But I need not, I think, go into any argument, for I am dealing, I know, with men who have equal experience to my own. I may say, however, that I believe the new A debentures will be a really good security, which will be marketable, and be worth at least par; and, if I am right, every holder will be released, if he so chooses, of 50 per cent. of his lock-up."

I refer to the liquidator's speech, not merely because it is an expression of his opinion, by which I must to some extent be influenced, but it is the representation made by him of his view of the matter to the debenture-holders and shareholders at the various meetings, and, so far as I can see, it is the statement upon which they have come to the conclusion which is shewn by the number of votes given in favour of the resolution adopting the scheme. I think, therefore, it is clear that a great many of the debenture-holders do consider that their securities will be improved in value by the proposed alteration. It does not follow that their position is to be measured by a comparison of what they are nominally entitled to receive under the existing debentures with what they would be nominally entitled to receive under the new ones. We must look at their whole position under the new debentures, as compared with their position under the old ones, before we can form an opinion whether their position will be improved or not.

Then it is suggested that the stay of the action brought by *Morrison* will be a great benefit. In answer to that it is said that no second debenture-holder can possibly break up the concern, so as to prejudice the first debenture-holders; for, whatever the second debenture-holders might do, they must leave the security of the first debenture-holders untouched. I do not think that answer goes to the root of the matter. There is a large number of first debenture-holders, and they all stand

C. A. 1890 *In re* Alabama, New Orleans, Texas and Pacific Junction Railway Co. North, J.

on an equal footing, and it is impossible for some of them to say to others, in the absence of any binding arrangement under a scheme, "It is so much against our common interest to realize any of the securities, that you shall not do so." They could not be heard to say so; and, if some of the first debenture-holders chose to insist upon having a proper proportion of the securities realized to satisfy them, the other debenture-holders could not be heard to say that it should not be done.

But it is said there is a practical answer; for, assuming that some of the holders of first debentures could insist upon a sale of securities, they would not do it, because it would not be to their interest. That remark, no doubt, has great force, but it does not go so far as the argument requires. Although, no doubt, persons with ample means, who could afford to wait, might think it desirable to do so, yet it does not follow that all the holders of first debentures would be in that position, whatever their wishes might be. Some of them might die, and their assets would then have to be realized in the best way possible, and their representatives could not afford to wait for years to see whether the debentures would ultimately be paid or not. Again, other debenture-holders might become bankrupt, and it would be necessary, then, that their securities should be realized under any circumstances. It is not open, therefore, to any first debenture-holders to say, that the other first debenture-holders could not force the realization of securities to some extent. And then this very important matter must be borne in mind, that a realization of the securities, even to a small extent, would operate very prejudicially upon the value of them all, because their value, according to the common case, depends on this—the company as a body holds the shares of four other companies in a number sufficient to enable them to control the operations of all those other companies. But, if some of the shares which they hold in those other companies have to be realized, that control may be lost, and so the realization at the instance of some of the first debenture-holders of part of the securities to which they are entitled might very prejudicially affect the other holders.

Under these circumstances, having regard to the various considerations which I have mentioned, it is clear that there is a

great deal to be said in answer to the arguments which have been put forward on behalf of the first debenture-holders. And the Legislature contemplates that a matter of this sort should be brought before the creditors and shareholders of the company. That has been done in the present case, with the result that the majority of first debenture-holders in favour of, or not opposing, the scheme is in value infinitely larger than the minority of those who oppose it; and, even of those who actually come here to support it, the majority in value is something like twenty-nine to one as compared with those who come here to oppose it. It seems to me that the matter is one as to which the debenture-holders, provided that they have had a fair opportunity of considering it, are the most competent persons to decide what is the best thing to be done; and, when I find that there is such a very large majority of first debenture-holders in favour of the scheme, I think that their views ought to have greater weight with me than those of the small minority who oppose.

Then comes the question, What is my duty under the Act? The Act is entitled "An Act to facilitate compromises and arrangements between creditors and shareholders of Joint Stock and other Companies in liquidation."

Then sect. 2 provides: "Where any compromise or arrangement shall be proposed between a company which is, at the time of the passing of this Act or afterwards, in the course of being wound up, either voluntarily or by or under the supervision of the Court, under the *Companies Acts*, 1862 and 1867, or either of them, and the creditors of such company, or any class of such creditors, it shall be lawful for the Court, in addition to any other of its powers, on the application in a summary way of any creditor or the liquidator, to order that a meeting of such creditors or class of creditors shall be summoned in such manner as the Court shall direct, and if a majority in number representing three-fourths in value of such creditors or class of creditors present either in person or by proxy at such meeting shall agree to any arrangement or compromise, such arrangement or compromise shall, if sanctioned by an order of the Court, be binding on all such creditors or class of creditors, as the case may be, and also on the liquidator and contributories of the said company."

C. A. 1890 *In re* Alabama, New Orleans, Texas and Pacific Junction Railway Co. North, J.

The section speaks of a "compromise or arrangement." What is a compromise? An arrangement between two parties by which they both make concessions and give up something. If I were to accede to the suggestion, that creditors of a company cannot be bound by any majority, however large, with regard to the amount to be paid to them, or the time when it is to be paid, or the security which is to be held in the meantime until payment—if these matters are outside the Act, I do not see how there can be any compromise with creditors with respect to which a majority can bind the minority. It seems to me that these are matters which come exactly within the Act; that it is for the creditors to judge of the proposed scheme, and that the statutory majority of the creditors can bind the minority.

But this can be done only if the arrangement is sanctioned by an order of the Court. Well, in what cases has the Court sanctioned such an arrangement?

I have already mentioned three cases in which the Court has sanctioned an arrangement which has actually prejudiced the position of creditors, and in two, if not all, of those cases the rights of debenture-holders were interfered with. And in *Re Madras Irrigation Company* (1) it was held, that the majority could bind the minority to give up their security on payment of less than was actually due upon it. The power of the Court to diminish the rights of secured creditors, therefore, seems to me to be clear.

It was suggested that debenture-holders are not creditors within the Act, but that point was not argued, because it was admitted by Mr. *Cozens-Hardy* that it was settled, so far as I am concerned, by *In re Empire Mining Company* (2), and the point was only mentioned in order that the parties might not be prejudiced hereafter by the fact that it had not been argued before me. I will say no more on that point, except that in deciding as I did in *In re Empire Mining Company*, I followed what Sir *George Jessel*, M.R., had done in *Slater* v. *Darlaston Steel and Iron Company* (3), and what the Court of Appeal had done in

(1) *Buckley* on the Companies Acts, 5th Ed., p. 551.

(2) 44 Ch. D. 402.

(3) W. N. (1877), p. 139, 165.

In re Dynevor, Dyffryn and Neath Abbey Collieries Company (1), where dissentient debenture-holders were held bound by the vote of the majority.

It is necessary before the arrangement can become binding on the creditors that it shall be sanctioned by an order of the Court, and the question is, under what circumstances ought the Court to give or to withhold its sanction? I do not find that there is very much authority to assist me in coming to a conclusion on that point. In *In re Dynevor, Dyffryn and Neath Abbey Collieries Company* the Court of Appeal said that, where an arrangement under this Act was a fair one and was likely to be beneficial to all parties, the Court would not be astute to find technical defects in the proceedings. And in *In re Wedgwood Coal and Iron Company* (2) Vice-Chancellor *Malins* said (3) that the Court, before giving its sanction, must be satisfied that the resolution had been carried *bonâ fide* by persons who really had regard to the interests of the company.

In the present case it was suggested that some of the persons who had voted as first debenture-holders might have been influenced by their being also holders of second debentures. But there is no evidence before me upon which I can give any weight to that argument. There is nothing in the slightest degree impugning the good faith and honest intention of all the first debenture-holders who support the resolution.

I postponed giving my judgment for a few days, because I wished to look at some cases decided under an Act which seems to me to be somewhat similar to the Act of 1870—I mean the *Companies Act*, 1867, which authorizes the reduction of the capital of a company with the sanction of the Court. Those cases, of course, do not bind me in the present case, but they may lay down a principle which will assist me. Sect. 11 of the *Companies Act* of 1867 says that a company which has passed a special resolution for reducing its capital may apply to the Court by petition for an order confirming the resolution, and the Court, if satisfied that the creditors will not be prejudiced, "may make an order confirming the reduction on such terms and subject

(1) 11 Ch. D. 605. (2) 6 Ch. D. 627.
(3) 6 Ch. D. 637.

C. A. 1890 *In re* Alabama, New Orleans, Texas and Pacific Junction Railway Co. North, J.

to such conditions as it deems fit." It seems to me that the discretion there given to the Court is very like the discretion given by the section with which I am now dealing. And, as regards the exercise of that discretion, I will not dwell upon the view which I myself expressed in *In re Barrow Hæmatite Steel Company* (1); but I wish to refer to what has been said about it by Lord Justice *Cotton* and Mr. Justice *Kay*. Lord Justice *Cotton*, in *Bannatyne* v. *Direct Spanish Telegraph Company* (2), said: "The Judge when he has to consider, under the provisions of the Acts of 1867 and 1877, whether he shall make an order sanctioning it" (that is, the reduction), "is only required by the Act of 1867 to be satisfied that the creditors are duly protected, yet when he is satisfied of that, it is not obligatory on him to authorize the scheme which is proposed. The words are: 'He may make an order, confirming the reduction on such terms, and subject to such conditions as he deems fit.' That leaves a discretion in him, and in my opinion, although it is not necessary to decide that point, I think that the Judge, when the matter is brought before him, if he sees it bears hardly on those who do not consent, may take that into consideration, and ought not to sanction a scheme simply because the creditors, who must be looked to, are dealt with properly, and have no ground of complaint." In other words, the Judge ought to consider whether what is proposed bears hardly on other parties interested.

Then Mr. Justice *Kay*, in *In re Direct Spanish Telegraph Company* (3), said: "The power given to the Court by sect. 11 of the *Companies Act*, 1867, to confirm a resolution to reduce capital is a discretionary power—that is to say, the Court may exercise it either by confirming, with or without conditions, or by declining to confirm on a full consideration of all the circumstances. One matter to be taken into account is whether the proposed scheme would work injustice between the different classes of the shareholders." The principle there applied seems to me to be one which the Court should apply now in a case which I regard as analogous.

(1) 39 Ch. D. 582. (2) 34 Ch. D. 287, 303.
(3) 34 Ch. D. 307, 312.

C. A. 1890 *In re* Alabama, New Orleans, Texas and Pacific Junction Railway Co. North, J.

There is another Act which, I think, throws some light upon the matter—I mean the *Life Assurance Companies Act* of 1870, sect. 14 of which provides that: "Where it is intended to amalgamate two or more companies, or to transfer the life assurance business of one company to another, the directors of any one or more of such companies may apply to the Court, by petition, to sanction the proposed arrangement, notice of such application being published in the *Gazette*, and the Court, after hearing the directors and other persons whom it considers entitled to be heard upon the petition, may confirm the same if it is satisfied that no sufficient objection to the arrangement has been established."

The words, "if it is satisfied that no sufficient objection to the arrangement has been established," are not in the present Act; but it seems to me that the principle upon which I ought to act in exercising my discretion is just the same as if those words were there. I must consider whether the scheme as a whole is a fair one, or whether it bears inequitably upon any of the persons entitled. I cannot find any reason why I should intervene to intercept the prosecution of a scheme which has been submitted to all the parties interested, and approved of by every one of them (so far as I can see) except the two gentlemen who now oppose. In my judgment, giving full weight to the objections which have been made, they are not sufficient to induce me to think that the scheme, which has been so carefully prepared and so generally received, ought not to have the sanction of the Court.

W. L. C.

From this judgment the two dissentient debenture-holders appealed.

C. A.

The appeal came on for hearing on the 16th of December, 1890.

Rigby, Q.C., *Cozens-Hardy*, Q.C., and *Levett*, for the Appellants:—

We appeal on two grounds. First, that the Court has no jurisdiction, under 33 & 34 Vict. c. 104, s. 2, to sanction a scheme which affects the interests of debenture-holders; and, secondly,

C. A. 1890

In re ALABAMA, NEW ORLEANS, TEXAS AND PACIFIC JUNCTION RAILWAY CO.

that if it has jurisdiction, it ought not to sanction this scheme which diminishes the rights of the debenture-holders without giving them any compensation.

The first point, although taken in the Court below, was not argued, because the learned Judge had decided it adversely to our contention in a previous case before him—*In re Empire Mining Company* (1). But we desire to insist on the objection in this Court. By the 159th and 160th sections of the *Companies Act*, 1862, the Court had power to sanction a compromise made by the liquidator with creditors of the company; but it had no jurisdiction to bind dissentient creditors: *In re Albert Life Assurance Company* (2). The *Companies Arrangement Act*, 1870, s. 2, gave the Court power to bind creditors if a statutory majority consented; but the Act only refers to creditors coming in under the winding-up. Debenture-holders are outside the winding-up: *In re David Lloyd & Co.* (3); *In re Richards & Co.* (4). A mortgagee of a portion only of the company's assets may come in under the winding-up in respect of what is beyond his security, but we have a security over the whole of the undertaking. If the debenture-holders are creditors within the meaning of the Act, the Court has no jurisdiction to deprive them of the benefit of their security: *In re Henry Pound, Son, & Hutchins* (5). Until the case of *In re Empire Mining Company* there had been no direct decision that debenture-holders are within the section. There have been *dicta* in some of the cases which are unfavourable to us; but they are not binding on this Court. In *Slater* v. *Darlaston Steel and Iron Company* (6) and *In re Tunis Railways Company* (7), the point does not seem to have been contested by the debenture-holders. In *In re Dynevor, Dyffryn and Neath Abbey Collieries Company* (8), the debenture-holders were not in any way injured, and, therefore, had no reason to complain. *In re Mammoth Copperopolis of Utah* (9), *In re North Western, &c., Company* (10), and *In re Dominion of Canada Freehold Estate*

(1) 44 Ch. D. 402.
(2) Law Rep. 6 Ch. 381.
(3) 6 Ch. D. 339.
(4) 11 Ch. D. 676.
(5) 42 Ch. D. 402.
(6) W. N. (1877), pp. 139, 165.
(7) 10 Ch. D. 270, n.; S.C. on appeal, 31 L. T. (N.S.) 264.
(8) 11 Ch. D. 605.
(9) *Palmer's* Co. Prec., 3rd Ed. p. 605.
(10) Ibid. p. 603.

and Timber Company (1) were also cases in which debenture-holders were included in the scheme, but the question of jurisdiction was not discussed or judicially decided.

Then, assuming there is jurisdiction to confirm the scheme, is it one that ought to be confirmed? We say that it ought not, for it is a scheme which cannot be beneficial to the class of first debenture-holders as a whole; and, therefore, ought not to be forced on any members of that class who do not assent to it. The Court will not adopt a scheme, though approved by a majority of a class, if the majority are not voting *bonâ fide* for the benefit of that class: *In re Wedgwood Coal and Iron Company* (2). Here many of the first-class debenture-holders have other interests, as shareholders, or holders of second-class debentures, in respect of which the scheme may benefit them, though it does not benefit them as first-class debenture-holders, for it takes away something that they had before, and gives them nothing in its place. The essence of a compromise is "give and take;" here we have nothing but "give."

[Fry, L.J.:—The A debentures will be marketable, and thus you may obtain a benefit; for the present first-class debentures appear to be unmarketable.]

There is no evidence of that beyond an *obiter dictum* in the chairman's speech. The scheme gives less to the first-class debenture-holders than they were entitled to before.

[Lindley, L.J.:—But you could not in the present state of affairs get what you were entitled to; so this scheme may be advantageous to you.]

We got all that the company could give us.

Sir *H. Davey*, Q.C., and *A. R. Kirby*, for the liquidator:—

[Lindley, L.J.:—We do not call upon you as to the jurisdiction, but only on the question whether the scheme can reasonably be considered capable of being beneficial to the first debenture-holders. Why do you appear for the liquidator alone? He seems to be a person who ought to stand neuter, and let the persons interested argue the question.]

(1) 55 L. T. (N.S.) 347. (2) 6 Ch. D. 627.

C. A. 1890 — *In re* Alabama, New Orleans, Texas and Pacific Junction Railway Co.

The Act provides that the liquidator shall petition for confirmation of the scheme; and he has, therefore, been treated as the party having the conduct of the proceedings.

[Lindley, L.J.:—We will hear the liquidator, because he can give full information as to the facts.]

The scheme is supported by first-class debenture-holders to the amount of £587,000, of whom less than one-fourth are holders of second-class debentures; and the only persons who appear to oppose are two gentlemen, holders of £20,000 first-class debentures. Their complaint is that this scheme is forced upon them not by an outside power, but by a majority of their own class. It is said that many of the class are not looking at the matter only as first-class debenture-holders, but as having other interests. That would not be conclusive.

[Lindley, L.J.:—No; but it is a matter to be considered by the Court as to confirming the scheme.]

No doubt; but there is no ground for saying that *quâ* first debenture-holders they might not reasonably consider this scheme advantageous to them. The meeting of the first debenture-holders was attended by 101 persons, of whom only eight held second debentures, and twenty-one were shareholders. The first-class debenture-holders get a benefit by receiving in satisfaction of part of their claim securities which will be readily negotiable, and the second debenture-holders do not get any great advantage, for they are to receive nothing till the interest of the A debentures is paid in full; and some advantage they must get to induce them to concur in the scheme. Ever since the Act was passed the Judges have taken this view, that the majority of a class voting fairly and freely are to decide what is for the benefit of the class; the Court will not put itself in their place. Your Lordships, if you were first-class debenture-holders, might think that this scheme was not for your benefit, but the principle of the Act is that if a certain majority of the class hold it to be for the benefit of the class, that must prevail, and the Court, though it may think the scheme not advantageous, will not refuse to confirm it, unless it can see that the scheme cannot possibly be for the benefit of the first-class debenture-holders.

[Lindley, L.J.:—Unless we see that, all we have to do is to see that a minority is not overborne by a majority composed of persons who have adverse interests.]

Consider the position of the company; it was formed for the purpose of holding the shares of four American railways with a view to working them under one system; it cannot, therefore, advantageously dispose of part of its undertaking, as the uniformity of management would thereby be destroyed. There is an arrear of interest on the first debentures to the amount of 21½ per cent. The scheme proposes to enable the first-class debenture-holders to take half their claim in well-secured bonds, and the other half in bonds of an inferior class; and so to get the undertaking out of the hands of the Court.

[Fry, L.J., referred to the provisions as to the directors being chosen by shareholders who would have no substantial interest.]

That is answered by the clause which requires the approval of the B and C debenture-holders to the appointment of directors.

Swinfen Eady, for holders of first and second debentures.

F. C. Norton, for other debenture-holders.

Eve, for the Plaintiff in the action.

Lindley, L.J.:—

This is an appeal by two holders of first debentures of a company which is called the *Alabama, New Orleans, Texas, and Pacific Junction Railway Company, Limited*, against an order made by Mr. Justice *North*, sanctioning the scheme which has been so much discussed before us. Two points of importance have been raised, namely, first the question arising upon the construction of the *Companies Arrangement Act* of 1870, whether the Court has jurisdiction to hold that a majority of secured creditors can bind the minority under the Act; and secondly, if they can, whether this is such a scheme as ought to be sanctioned by the Court.

Now, with reference to the first question, the *Companies Arrangement Act* of 1870 was passed for the purpose of increasing the power of creditors to make arrangements and

C. A. 1890

In re ALABAMA, NEW ORLEANS, TEXAS AND PACIFIC JUNCTION RAILWAY CO.

Lindley, L.J.

compromises with liquidators. Under the Act of 1862, the compromise clauses were the 159th and 160th, and under that Act there was a difficulty, if not an impossibility, of majorities of creditors binding minorities. If there was any such power it was very restricted, and it was to enlarge the power in that respect that the Act of 1870 was passed. Now, by sect. 2 of that Act, it is enacted: "Where any compromise or arrangement shall be proposed between a company which is, at the time of the passing of this Act or afterwards, in the course of being wound up, either voluntarily or by or under the supervision of the Court, under the *Companies Acts*, 1862 and 1867, or either of them, and the creditors of such company, or any class of such creditors, it shall be lawful for the Court, in addition to any other of its powers, on the application in a summary way of any creditor or the liquidator, to order that a meeting of such creditors or class of creditors shall be summoned in such manner as the Court shall direct, and if a majority in number, representing three-fourths in value, of such creditors or class of creditors present either in person or by proxy at such meeting shall agree to any arrangement or compromise, such arrangement or compromise shall, if sanctioned by an order of the Court, be binding on all such creditors or class of creditors, as the case may be, and also on the liquidator and contributories of the said company." That is the section, and it is obvious that it applies only where a company is being wound up. Companies are not wound up even voluntarily, if they can go on as they are with profit. A company is not wound up unless something has happened which renders it desirable that some great change shall be made. If it is wound up because it is in difficulties, that is the ordinary case; sometimes we know companies are wound up voluntarily when they are not in difficulties, when they want to be reconstructed so as to get further advantages, but in ninety-nine cases out of a hundred the company is in trouble and cannot pay its creditors 20*s.* in the pound. It is in those cases the Legislature has thought fit to enlarge the power of making compromises or arrangements, and the language of the section is wide enough to include all creditors, whether they hold securities or whether they do not

hold securities—they are still creditors; and they can come in if they like and prove. If they are amply secured they need not come—they can hold their securities; but still they are creditors. Unless this Act is construed so as to include all creditors, it appears to me obvious that in a great many instances the Act would be a dead letter.

In this particular company which was formed in 1881 with a very large capital, divided into a large number of shares, a considerable number of debentures have been issued. They have issued £1,500,000 of 6 per cent. first debentures, and they have issued also £700,000 of 6 per cent. second debentures. These debentures are secured by what is called a covering deed, which deed includes all the assets of the company. The capital, we are told, has been all paid up. Now, supposing that there were no creditors besides these debenture creditors, how could the company make any arrangement with anybody if the debenture creditors are not included in the Act? It appears to me that, if you look at the language of the Act, the construction of it involves the necessity of holding, in order to carry out its objects, that secured creditors, whether secured by covering deeds, debentures, or otherwise, are within the Act, and that the Court can sanction a scheme when it is approved by the proper majority, even against the will of a minority.

With reference to the decisions, I am not going through them at any length. It appears to me, having looked at them with care and heard the observations made by Mr. *Cozens-Hardy* and Mr. *Rigby* upon them, that with the exception of *In re Empire Mining Company* (1) there is no case so strictly in point as that this Court ought to consider itself bound to follow it. I will not go through the reasons; but there have been circumstances in each case which render the cases unsatisfactory as clear and positive decisions, either one way or the other. But, although that is true, there are certainly observations to be found in many of them which tend to shew that the construction which I consider ought to be put upon this Act, has been put upon it, even from the very beginning. I cannot find any indication of an opinion the other way. *In re Empire Mining Company* (1)

(1) 44 Ch. D. 402.

C. A. 1890 *In re* Alabama, New Orleans, Texas and Pacific Junction Railway Co. Lindley, L.J.

is a decision by Mr. Justice *North* in favour of the construction which I think is the right one, and this Appeal is avowedly brought in order to have that decision reviewed. So far as jurisdiction goes, it seems to me that the Court has jurisdiction.

Then with respect to the scheme itself, Mr. *Rigby* has called our attention to the fact that this Act unquestionably is not framed on precisely the same lines as the Acts relating to railway companies and their arrangements. It is curious, but it is well known to all of us as a fact, that the joint stock companies of this country are governed by two parallel sets of Acts which are not consistent. Why they should not be all consolidated is not for me to say; but it is true, that railway companies and companies of that kind, incorporated by special Acts of Parliament, are governed by one set of Acts, and that these registered joint stock companies are governed by sets of Acts of their own; but although there are differences, there are common principles in many instances running through them. We have here to deal with companies registered under the Acts of 1862 and 1867, to which I have alluded, and all that Parliament has thought it necessary to require is, that there shall be a meeting of the creditors, to be summoned in such manner as the Court shall direct, and that there shall be a majority in number representing three-fourths in value of such creditors present, either in person or by proxy at such meeting. Now, in 1870, I do not think that debentures payable to bearer, and share warrants payable to bearer, were anything like so common as they are now. They were tolerably common, but not so common as they are now; and it is quite usual that where, as here, you have a huge debenture debt represented by debentures payable to bearer, you may have a comparatively small meeting answering the notices and summons convening it, because it is very difficult to give notice to persons who hold debentures payable to bearer. It is said that people do not look in the newspapers to see if there are any advertisements with reference to the companies in which they are interested, and there must be a multitude of persons who have never seen these advertisements at all. I think that is very likely, but, still, there is the statute, and what the Court has to do is to see, first of all, that the

provisions of that statute have been complied with; and, secondly, that the majority has been acting *bonâ fide*. The Court also has to see that the minority is not being overridden by a majority having interests of its own clashing with those of the minority whom they seek to coerce. Further than that, the Court has to look at the scheme and see whether it is one as to which persons acting honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can be reasonably taken by business men. The Court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting *bonâ fide*, and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve of it.

Now, as regards *bona fides*, there is really no attack upon these gentlemen. An order was made by the Chief Clerk, summoning or directing a meeting to be summoned. That meeting was summoned in the way directed. It was attended by very few people, considering the enormous quantity of debentures which were outstanding. It was attended by 101 persons, and they together held a little more than half a million of these debentures, there being a million and a half of them. There were ninety of those who voted for the scheme, and eleven voted against it. No poll was demanded; and the present gentlemen, who were amongst the opponents of the scheme, practically agreed that the three-fourths were against them, so that we may take it that, at that meeting at all events, the statutory majority was in favour of the scheme, although there was no poll, and we have not got the detailed numbers.

Now, it is said, and said with truth, that some of the majority held second debentures; and it is also said, that some of the majority were shareholders holding a considerable amount of shares; and it is urged that they voted not simply as first debenture-holders, and were not looking at the matter from the point of view of first debenture-holders, but from the point of view of second debenture-holders, and of interested shareholders. That

C. A. 1890 *In re* ALABAMA, NEW ORLEANS, TEXAS AND PACIFIC JUNCTION RAILWAY CO. Lindley, L.J.

state of complicated interest would not prevent them from voting, but it would necessarily induce the Court to look with caution and care at the effect of what was done at that meeting. Now, I could understand that a dissentient might say that, in consequence of the shortness of the notice convening the meeting, in consequence of the complex interests of some of the majority, that meeting did not really represent the views of the debenture-holders. I can understand that, and I can understand that it might be reasonable to convene another meeting to ascertain whether the real bulk of the first debenture-holders were in favour of the scheme, but no such application has been made, and Mr. *Rigby*, thinking probably, I suppose, that if another meeting were convened there would still be three-fourths against him, has naturally not desired to have another meeting called.

We come, therefore, to consider the scheme itself, and the objections which have been taken to it. I do not propose to go through all of the objections, but to look at the thing fairly as a whole and consider what there is in the state of this company which renders a scheme necessary at all, and what will be the effect of the scheme upon the first debenture-holders, and then see whether it was one which a majority of the first debenture-holders could reasonably consider advantageous to them. They say that it is advantageous to them. Now, just let us see what the real position of affairs is on that point. The first debenture-holders are the holders of £1,500,000 6 per cent. debentures. The interest on them at 6 per cent. is £90,000. They cannot get the £90,000, simply because the income of this company does not yield it. There is a considerable deficiency, and Mr. *Rigby* says—and I hope he says with perfect truth—that the company will pay that—that if it is allowed to go on as it is the income will be enough to produce that amount; but at present it does not, and the position of the company is anything but satisfactory from a commercial point of view. In the first place there is an action in the Chancery Division of this Court, instituted by Mr. *Morrison*, a debenture-holder suing on behalf of himself and other debenture-holders for a receiver, and there is a receiver appointed. Well, we know perfectly well, without being told, that that does not add to the credit of the company and does

not improve its commercial position. Then, in addition to that, the company is being wound up, and there is a liquidator who happens to be the same person as the receiver. That is the position of affairs.

Now, what does the scheme do? It does not deprive the first debenture-holders of their £90,000; it redistributes that £90,000 amongst them. I must say it is an extremely ingenious scheme, drawn up by people who evidently know what they are about. They divide the £1,500,000 6 per cent. first debentures, which are not a satisfactory security at present, into halves. They turn half of them into 5 per cent. A debentures, and those debentures are a first-class security. There can be no question at all about that. Then they turn the other half into B debentures, also bearing interest at 5 per cent.; and there is an arrear of interest which is added to the capital of the B debentures; and there is a small sum of 30*s.* per debenture which is given to the debenture-holders in cash. Now, there is a difference as regards the income of these first debenture-holders. At present any arrears of income must be made up before the other debenture-holders can get anything. Under the proposed scheme I think that is only true as regards the A debentures. The A debentures which represent the first half of their debt are made "repayable on the 1st of November, 1940, but redeemable at the option of the company after the year 1910, upon six months' notice, at the price of 115 per cent. Interest to run from the 1st of November, 1890, and to be payable half yearly on the 1st of May and the 1st of November; but until the 1st of November, 1895, interest to be payable only out of profits, and, in the event of deficiency, such interest to accumulate, the debenture-holders having no rights of foreclosure or other action until the 1st of November, 1895." And then it goes on as to the B debentures, which I will not pause to read at this moment.

Now, Mr. *Rigby's* broad objection to the scheme really amounts to this: "Leave us alone; we have got at present a right to the £90,000 income, and you propose to give it in a worse shape; and even when we get it we gain nothing: we lose by this scheme." If this is true, it is strange that a majority of the first debenture-holders should take a different

C. A. 1890 *In re* Alabama, New Orleans, Texas and Pacific Junction Railway Co. Lindley, L.J.

view. But when you come to look at it, you will see that the explanation—and the satisfactory explanation, to my mind—is this: You, the first debenture-holders, get advantages under this scheme which you have not now got and cannot get. First of all, you get rid of the receivership action, and you get rid of the winding-up; secondly, you get, as regards half of your debentures, a far better position than you have got as to the whole; and thirdly, you get in the shape of B debentures, taken for the other half, the same amount of nominal capital, the same amount of interest—payable, it is true, out of profits—but you get control over the affairs of the company by reason of the arrangements made respecting the directors, which is referred to in paragraphs 8 and 9, and you get a right to interest on the arrears as I have already pointed out. Therefore, if you look at it from a commercial point of view, and not from a lawyer's point of view, you are in a decidedly better position by this scheme than you would be if things were left alone. That is the view of the majority. Now, can anybody say that this is not a reasonable view for the majority to take? Whether they have other interests or not, I think we ought to see whether anything can be said against the reasonableness of the view taken by the majority of the first debenture-holders, without reference to whether they are second debenture-holders, or whether they are shareholders or not. Can anybody say that this scheme is not in a commercial sense extremely advantageous to them, having regard to their position? It appears to me that no reasonable man can take that view; I think therefore that the view of the majority should bind the minority, and that the scheme should be sanctioned.

Bowen, L.J.:—

I am of the same opinion. I should like to say a few words as the matter is an important one, and this is a very remarkable Act of Parliament. It enables the Court to order a meeting of creditors, or of classes of creditors, when a company is in liquidation, to consider the expediency of a compromise or arrangement, and the Court may sanction the compromise or arrangement if the meeting is in its favour. The first point made by Mr. *Hardy* was this. He said that the section did not give the Court power

to sanction an arrangement which interfered with the securities of secured creditors, and that secured creditors were not creditors within the meaning of the section. It seems to me that it is impossible to hold that secured creditors were not within the meaning of words which are as general as these. This section has to be read with the liquidation sections of the Act of 1862, which, in sects. 159 and 160, gave permissive powers to liquidators with regard to compromises and arrangements with creditors. When we come to the Act of 1870, which deals with compromises between the company and the creditors of a company, the word "creditors" must have as large a meaning, and include every conceivable class of creditors.

Then comes the more serious point, whether this is a compromise or arrangement which is within either the words of the section or within the true spirit of the legislation; that is to say, whether the Court has either jurisdiction to sanction it, or ought to sanction it. I do not think myself that the point of jurisdiction is worth discussing at much length, because everybody will agree that a compromise or agreement which has to be sanctioned by the Court must be reasonable, and that no arrangement or compromise can be said to be reasonable in which you can get nothing and give up everything. A reasonable compromise must be a compromise which can, by reasonable people conversant with the subject, be regarded as beneficial to those on both sides who are making it. Now, I have no doubt at all that it would be improper for the Court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such, otherwise the sanction of the Court would be a sanction to what would be a scheme of confiscation. The object of this section is not confiscation. It is not that one person should be a victim, and that the rest of the body should feast upon his rights. Its object is to enable compromises to be made which are for the common benefit of the creditors as creditors, or for the common benefit of some class of creditors as such. Now, it is very important to observe that creditors of the company may have other interests besides those of creditors, and that there may be a class of creditors

C. A. 1890 *In re* Alabama, New Orleans, Texas and Pacific Junction Railway Co. Bowen, L.J.

composed of many individuals—some of whom have only interests as members of that class but others of whom may have interests of a predominant kind which they hold, not as members of that class, but because they belong also to some other class of creditors, or because they also belong to the body of shareholders of the company. Therefore, although in a meeting which is to be held under this section it is perfectly fair for every man to do that which is best for himself, yet the Court, which has to see what is reasonable and just as regards the interests of the whole class, would certainly be very much influenced in its decision, if it turned out that the majority was composed of persons who had not really the interests of that class at stake. Mr. *Rigby* argued that nobody can be benefited in law by having that which is his legal right taken away from him. We are not, however, considering whether there has been the loss of a merely nominal legal right, but whether what has been done is beneficial in a business sense. When looked at from a business point of view, this scheme is an excellent one for the debenture-holders of the first class, its leading idea being to take the company out of the hands of the Court and of the receiver; and as regards the securities of the first class of debentures, to confer fresh life upon them by separating a moribund interest into two parts cutting off the one, and giving increased vitality to the other. That seems to me an excellent commercial scheme, and one which may reasonably be considered as an advantage by a first-class debenture-holder as such.

The first-class debenture-holders, as such, have considered the scheme beneficial as a whole, and business men generally know what is for their own interests. They have held a meeting; and, although the meeting is held under a section which requires to be worked with the greatest care, nevertheless in this case we have this striking fact, that out of this mass of debentures the Appellants represent only £20,000. They have been joined by no waverers since. They represent nobody apparently but themselves; and Mr. *Rigby* does not suggest to us that he can better his position by any further meeting. The true conclusion is that the mass of first-class debenture-holders take the view that this commercial scheme will work, and that it is the best thing

that can be done in the interest of themselves as holders of first-class debentures.

But the Court has other things to consider before sanctioning a scheme which may injure persons who hold property and which is being enforced by a majority upon a minority. It is not, as it seems to me, at all compulsory upon the Court to register the decrees of a meeting simply because three-fourths in value of the meeting have given that assent which the statute renders a condition precedent to the jurisdiction of the Court. The Court has still to consider the circumstances.

It is in my judgment desirable to call attention to this section, and to the extreme care which ought to be brought to bear upon the holding of meetings under it. It enables a compromise to be forced upon the outside creditors by a majority of the body, or upon a class of the outside creditors by a majority of that class. It would be most unjust to bind creditors or classes of creditors by the decision of three-fourths in value of those who attend a particular meeting, unless you have secured that the meeting shall adequately represent the entire body. But the section makes no provision for that, except by enacting that the meeting is to be held in the manner in which the Court shall direct. That, to my mind, throws upon the Chief Clerk the responsibility of seeing—when a proposal is brought before him by persons who are interested in carrying it through—that adequate notice is given to the body of creditors, who otherwise might know nothing about the matter. If I had been looking alone at this order, which was made by the Chief Clerk, I confess I should have had considerable doubts whether it was reasonable to bind the whole body of the debenture-holders by a meeting as to which the only notice given was that which was indicated in the order. This is a matter about which the Court ought to be watchful. There may be circumstances which would make it unsafe to act on the conclusion of a meeting, although the conclusion was both emphatic and distinct.

But, in this particular case, the course of the argument convinces me beyond all reasonable possibility of doubt that this meeting did fairly represent the debenture-holders. The appeal therefore ought to be dismissed with costs.

C. A.
1890
In re Alabama, New Orleans, Texas and Pacific Junction Railway Co.

Fry, L.J.:—

This case has been so fully and earnestly argued, that, although I entirely concur in the judgments which have been delivered, I will add a few words of my own.

With regard to the construction of the Act, it appears to me to be plain that this case is one which is within the jurisdiction of the Court. That jurisdiction is conferred by the Act of 1870, and the words there are of the largest description: "Where any compromise or arrangement shall be proposed between a company" which is being wound up "and the creditors of such company or any class of such creditors, it shall be lawful," and so on. Now, what is the class of creditors which would occur to the mind of the writer or the reader of that passage as being the most familiar class in the winding-up of a company? I suppose everybody conversant with the subject would answer, the debenture-holders. If not always, yet usually the debenture-holders are creditors with a security, and therefore it appears to me that the secured creditors must have been in the mind of the Legislature when the language which I have read was used by them.

But, again, what kind of compromise or arrangement is the most common? Surely the most common kind of compromise or arrangement is one in which secured creditors diminish or alter the amount of their security. I repeat that, the Legislature having used the largest language, such as "any compromise or any arrangement between a company and any class of its creditors," I think, if we were to exclude from the arrangements or compromises to be made, an arrangement or compromise which affected the security, we should be putting a most unwarrantable restriction on the generality of the language used in the Act, and therefore I have no hesitation in saying that, in my judgment, the Court has jurisdiction in this matter.

Then it is to be borne in mind, in the next place, that the Legislature has vested the discretion, in regard to what is to be done by the creditors or class of creditors, so far as it rests with them, not in any majority of the entire class, but in the majority of that class who are present at a meeting, either personally or by proxy; and, that being so, it is impossible to us to reintroduce

by decision regulations with regard to an absolute majority of the class which may prevail in the case of other companies. I do not think that the Court has any right so to fetter the powers given by the Legislature.

Then the next inquiry is—Under what circumstances is the Court to sanction a resolution which has been passed approving of a compromise or arrangement? I shall not attempt to define what elements may enter into the consideration of the Court beyond this, that I do not doubt for a moment that the Court is bound to ascertain that all the conditions required by the statute have been complied with; it is bound to be satisfied that the proposition was made in good faith; and, further, it must be satisfied that the proposal was at least so far fair and reasonable, as that an intelligent and honest man, who is a member of that class, and acting alone in respect of his interest as such a member, might approve of it. What other circumstances the Court may take into consideration I will not attempt to forecast.

But, in the present case, all the conditions which I have mentioned as necessary, appear to me to have been satisfied. It has been made out, I think to the satisfaction of all of us, that the statutory conditions have been complied with and that the proposal was made in good faith, and after full discussion of the matter, I have no hesitation whatever in saying that I am convinced that the proposal is one which an intelligent man holding debentures of the first class, and nothing else, and with no other interest and no other bias influencing his mind, might reasonably approve of. I have come to the conclusion that, if I were such a holder, I should not oppose the scheme, but accede to it, and for the reasons which have been pointed out by the Lords Justices who have preceded me. The moment it is seen that the whole of the £90,000 per annum, which is the extreme amount of the interest that the present first debenture-holders can be entitled to receive, will be still received by them, though in a different character and under a different title, the greater portion of the objections to the scheme which are suggested disappear, according to my judgment. But when we find that it divides the first class of debentures into two, giving one of them a first-class security and the other an inferior security and with a power of regulating the

C. A. 1890 *In re* Alabama, New Orleans, Texas and Pacific Junction Railway Co. Fry, L.J.

election of directors of the company; and when we find that it substitutes a living company for a receivership and a liquidation, I confess I have come clearly to the conclusion that this is a reasonable and fair scheme. I think, therefore, that the learned Judge in the Court below was right and this appeal must be dismissed, and dismissed with costs.

For myself, I should wish to add this, that I should have been better pleased if the stress of the opposition had come in this case, not from the liquidator, but from those first debenture-holders who appeared and supported the liquidator. Where a class of persons divides itself into two, and the liquidator or receiver or trustee is alike the liquidator, receiver, or trustee for all of them, and where both those classes appear in their own proper persons, I doubt the propriety of the liquidator, receiver, or trustee taking a strong part on one side or the other.

Solicitors: *Slaughter & May; Norton, Rose & Co.; Ashurst, Morris, Crisp & Co.; Lattey & Hart.*

M. W.

C. A. 1890 NORTH, J. *Nov.* 6. C. A. *Dec.* 19, 20.

EARL OF AYLESFORD *v.* EARL POULETT.

[1886 A. 1480.]

Solicitor—Costs—Taxation—Scale Fee—Mortgage—Further Charge—Previous investigation of Title—General Order under Solicitors' Remuneration Act, 1881, *Sched. I., Part I., r.* 10.

The tenant for life of settled estates had created charges on his life estate for sums amounting in the whole to £192,000, and the charges had all become vested in an insurance company. A private Act was passed which empowered the trustees of the settlement to raise, by mortgaging the settled estates in fee, any sum not exceeding £350,000, for the purpose of paying the debts of the tenant for life. The trustees executed a mortgage of the estates in fee to the company to secure £232,000. Of this sum £192,000 was retained by the company in satisfaction of the charges on the life estate (which were released by a separate deed), and £40,000 was paid to the trustees:—

Held, by North, J., affirming the decision of the Taxing Master, that the transaction amounted to a further charge within the meaning of rule 10 in Part I. of Sched. I. to the Solicitors' Remuneration Order, 1882; that

the title to the property had been in substance already investigated within the meaning of that rule; and that the mortgagees' solicitor was not entitled to any scale fee in respect of the mortgage, but must be remunerated under Sched. II. to the Order:

Held, on appeal, that the transaction was a new mortgage, and not a further charge, and therefore did not fall within rule 10, and that the mortgagees' solicitor was entitled to the scale fee on a mortgage for £232,000.

SUMMONS to review a taxation of costs.

The action was brought by *Charles*, eighth Earl of *Aylesford*, who was the tenant for life in possession of certain settled estates, against Earl *Poulett* and *F. R. Knollys*, who were trustees of a settlement of the estates, dated the 3rd of January, 1871, and also trustees for the purposes of a private Act of Parliament (45 & 46 Vict. c. 3), called the *Earl of Aylesford's Estate Act*, 1882. The Act was passed in the lifetime of the seventh Earl of *Aylesford*, the then tenant for life of the estates, to enable (*inter alia*) the trustees of the settled estates to raise money for payment of his debts. At the date of the passing of the Act there were existing a number of charges, for sums amounting in the whole to £192,000, upon the life estate of the seventh Earl, all of which had then become vested in the trustees of the *Eagle Insurance Company*. The Act (by sect. 23) empowered the trustees at any time, or from time to time, after the passing thereof, to raise by mortgage of the settled estates, or any part thereof, any sum or sums not exceeding altogether £350,000, and provided that the trustees might convey the settled estates, or any part thereof, to any person or persons for an estate in fee simple, or any less estate, by way of mortgage for securing payment of the money raised and the interest thereon. And sect. 24 provided that every conveyance by way of mortgage made under the Act should take effect, subject to certain paramount charges, and also to the life estate charges, or such of them as should not be released, but in priority to all estates for life and estates in tail male, and to the remainder in fee limited by the settlement of 1871. The trustees were authorized out of the money so raised to pay off the mortgages on the life estate, and other debts of the tenant for life.

Under the power thus conferred on them, the trustees on the

C. A. 1890 — EARL OF AYLESFORD v. EARL POULETT.

7th of August, 1883, executed a mortgage in fee of part of the settled estates to the trustees of the *Eagle Company* for £232,000, out of which sum the charges for £192,000 on the seventh Earl's life estate were retained by the company, the sum of £40,000 only being in fact advanced by the company to the trustees of the settlement. The mortgage deed contained a recital that all the charges on the Earl's life estate had been satisfied and released, and the deed purported to be made in consideration of the sum of £232,000 to the trustees of the settlement "now paid" by the mortgagees. The charges on the life estate were released by a separate deed.

The seventh Earl died on the 13th of January, 1885, without issue male. By the statement of claim in the present case the Plaintiff, the eighth Earl, who, on the death of the seventh Earl, became tenant for life in possession of the settled estates, claimed (*inter alia*) an account of all moneys come to the hands of the Defendants as trustees for the purposes of the Act, or as trustees of the settlement of 1871, and payment to the Plaintiff of what (if anything) might be found due to him, as tenant for life under the settlement, from the Defendants.

On the 26th of January, 1887, an order was made by Mr. Justice *North* that an account should be taken of all moneys come to the hands of the Defendants as trustees for the purposes of the Act, or as trustees of the settlement of 1871, and of the application of all such moneys.

Under this order the Defendants brought in (*inter alia*) seventeen bills of costs, which they claimed to charge against the moneys come to their hands as trustees, one of their bills being that of the solicitors of the *Eagle Company* in respect of the mortgage for £232,000. The chief clerk requested the Taxing Master to tax and settle these bills, to assist him in making proper allowance in respect thereof in taking the accounts of the trustees. Among other items in the bill of the *Eagle Company's* solicitors, which had been paid by the trustees, was a sum of £1255 for commission in relation to the loan of £232,000, being the amount chargeable under the scale of the Incorporated Law Society. The Taxing Master disallowed this item to the extent of £1110, thus reducing it to £145, that being the "scale fee"

prescribed by the Solicitors' Remuneration Order of 1882 for investigating title and preparing and completing mortgage for £40,000. The Defendants carried in an objection to this disallowance, in which they said, "The item of £1255 should have been allowed at £455, being the amount according to the scale authorized by the *Solicitors' Remuneration Act*, 1881, upon a mortgage for £232,000. The mortgage for the £232,000 was a new and independent transaction, and entirely distinct from the mortgage for £192,000, which previously existed upon the life estate."

The Plaintiff made the following answer to the objection: "The £192,000 representing the mortgage on the late Earl's life estate was repaid out of the advance of £232,000, the sum lent on the fee of the settled estates. The nature of the security was changed, and £40,000 further was advanced; that is all. It is contended that the title was thoroughly investigated by the solicitors of the *Eagle Company* when the £192,000 was advanced, and that it would only be necessary for them to inspect a few further documents subsequently executed." The Taxing Master gave the following answer: "The facts are correctly stated in the Plaintiff's answer to the Defendants' objection. The solicitors have already been once paid for investigating the title, at least, on £192,000, part of £232,000, that is on the life estate. On the present occasion an additional £40,000 was advanced, no doubt this time on the fee. But the transaction was between the same parties, and, as before observed, the proper fee had been already paid for investigating the title. On the present occasion the Defendants are really entitled to nothing more than the proper charges under Sched. II., and I invited them to bring in such items. This they declined to do, contending that they were entitled to be allowed the full scale item on £232,000. In these circumstances I have, with the assent of the Plaintiff's solicitors, allowed them £145, being the scale fee on £40,000, which is, in my judgment, much more than the Defendants would be allowed if items were brought in under Sched. II."

By the present summons the Defendants asked that the above stated objection (and certain other objections) to the taxation of costs under the Chief Clerk's request might be allowed, and that

C. A. 1890 EARL OF AYLESFORD v. EARL POULETT.

it might be referred back to the Taxing Master to vary his certificate accordingly.

The summons was heard before Mr. Justice *North* on the 6th of November, 1890.

Napier Higgins, Q.C., and *Dauney*, for the Defendants:—

The scale fee in respect of £232,000 ought to have been allowed. The mortgage of the 7th of August, 1883, to the trustees of the *Eagle Company* was not a transfer or a further charge. It was a new and independent transaction; the security being different from that of the former mortgages, and the parties different. Rule 10 (1) in Part 1 of Sched. I., to the Remuneration Order does not prevent the solicitor from claiming the scale fee in respect of £232,000. There was really a fresh investigation of title. The title to the fee had to be investigated, not merely the title to the life estate, and the authority of the trustees to mortgage the fee depended upon the Act.

Cozens-Hardy, Q.C., and *W. C. Druce*, for the Plaintiff:—

The Court must look at the substance of the transaction, which was a further advance of £40,000 by the *Eagle*. The title to the fee was in substance the same as that to the life estate, and it had been quite recently investigated by the Company. The only new thing to be investigated was the private Act.

Napier Higgins, in reply:—

If the argument for the Plaintiff is right, a solicitor can never claim the scale fee in respect of a mortgage if there has ever been a previous partial investigation of the title to the property. In *Ex parte Mayor of London* (2) the title was a statutory one and the solicitor of the purchaser had only to look at an Act of

(1) Rule 10: "The above scale as to mortgages is to apply to transfers of mortgages where the title is investigated, but not to transfers where the title was investigated by the same solicitor on the original mortgage or in any previous transfer; and it is not to apply to further charges, where the title has been so previously investigated. As to such transfers and further charges, the remuneration is to be regulated according to the present system as altered by Sched. II. hereto. But the scale for negotiating the loan shall be chargeable on such transfers and further charges where it is applicable."

(2) 34 Ch. D. 452.

Parliament, and a letter written by the Lord Chancellor authorizing the sale; and Mr. Justice *Kay* held that the title had been investigated, and that the purchaser's solicitor was entitled to the scale fee. Here the advance was made on the security of the new title created by the Act. The title was not the same, or in substance the same, as in the case of the prior mortgages.

NORTH, J.:—

I think the words in which rule 10 is expressed are not very clear; but, after the best consideration I have been able to give to the case, I have come to the conclusion that the Taxing Master's decision was right. [His Lordship read rule 10.]

Let me put the simplest possible case. Suppose the owner in fee of an estate mortgages it and then dies, the mortgage being still in existence, and his son, claiming to be his heir-at-law, desires to obtain a further advance from the mortgagee on the security of the estate. Does rule 10 exclude the right of the mortgagee's solicitor to the scale fee or not? It must be remembered that, if the scale does not apply, the solicitor will still be remunerated for his work, for an alternative mode of remuneration is provided by the rule. The only question is, whether the solicitor is to be paid in the one way or in the other. In the simple case which I have put, could it or could it not be said that the title had been already investigated? Could it be said that the title had not been previously investigated, merely because it would be necessary to look at the will of the mortgagor or to inquire into the heirship of his son in order to see whether he had power to mortgage the property? The argument on one side is, that it can never be said that the title to property has been previously investigated, unless not the slightest change has taken place in the position of the mortgagor; and that, if anything further, however trifling, has to be done, there will be a fresh investigation of title. On the other side, it is asked, could it be said that the title to mortgaged property had not been previously investigated merely because ten closes were comprised in the further charge, instead of only one in the original mortgage? In my opinion, the Court must deal with each case as it arises, and you must not test the rule by putting

C. A. 1890 EARL OF AYLESFORD v. EARL POULETT. North, J.

extreme cases. Suppose a mortgagor is tenant for life, his son being entitled to the remainder in fee. If the mortgagor obtains a further advance, by means of a mortgage of the estate in fee by himself and his son, can it be said that there is a fresh investigation of the title? I think not, though the further charge will be on the estate in fee, and not on the life estate. What are the facts in the present case? The mortgages which had become vested in the trustees of the *Eagle Company* were charges upon the life estate of the tenant for life. The Act of Parliament enabled the trustees of the settlement to create a greater charge upon the fee of the estates. The trustees did create a greater charge upon the fee, taking in exchange for it a release of the existing charges upon the life interest, and a further advance of £40,000. In my opinion, there was not any fresh investigation of title, for the title had been already in substance investigated by the company when they made the advance of £192,000. In my opinion, the case is within the words of rule 10, and the mere fact that it was necessary when the further advance was made to look at the provisions of the Act, does not prevent its being said that the title had been previously investigated within the meaning of the rule. On the best consideration I can give to the rule, I think that the £40,000 was a further charge, but that the solicitor was not entitled to the scale fee, because the title had been already investigated by him. In strictness, therefore, the solicitor was only entitled to be remunerated under Schedule II. to the Remuneration Order. But the Plaintiff has submitted to the allowance of the scale fee in respect of £40,000, and I have not been asked to vary the order in this respect. The summons will be dismissed.

W. L. C.

C. A.

The Defendants appealed. The appeal was heard on the 19th of December, 1890.

Napier Higgins, Q.C., and *Dauney*, for the appeal:—

The scale fees ought to be allowed on this as a new mortgage. It is to all intents and purposes such: it is on a different estate, and made by different parties from the old mortgages. It comes

within Schedule I., Part I., of the Solicitors' Remuneration Order, 1882, and cannot be brought within rule 10, for it is neither a transfer nor a further charge.

Cozens-Hardy, Q.C., and *W. C. Druce*, for the Plaintiff:—

The substance and not the form of the transaction is to be looked at. The substance was a further advance of £40,000, and an additional security for the £192,000. Now the schedule does not provide a scale fee for a deed giving further security. The title had been investigated when the *Eagle Company* advanced the £192,000 and there was nothing more to peruse except the *Aylesford Estate Act*. The work for which the scale fee is given was therefore not performed.

Napier Higgins, in reply:—

The transaction was a new transaction. The £232,000 was borrowed at a lower rate of interest than the £192,000 carried. The scale fee cannot cease to be applicable merely because a part of the title had been previously investigated. Here was a new statutory title which required to be carefully examined. The scale fee was allowed in *Ex parte Mayor of London* (1), where nothing had to be perused but an Act of Parliament.

1890. Dec. 20. LINDLEY, L.J.:—

This is a question of some importance to solicitors. The late tenant for life of the *Aylesford* estates was indebted to the *Eagle Company* in a considerable sum, the company having mortgages on his life estate for sums amounting to £192,000. In 1882 the *Aylesford Estate Act* was passed, which, after reciting the incumbrances on the life estate, empowered the trustees of the settlement to raise by mortgage of the settled estates any sum or sums not exceeding in the whole £350,000, and to apply the money so raised in paying off the charges on the life interest and other debts of the tenant for life. Under that power the trustees mortgaged in fee a part of the settled estates to the *Eagle Company* for £232,000, out of which £192,000 was applied in paying off the mortgages on the life interest, and so was retained by the

(1) 34 Ch. D. 452.

C. A. 1890 EARL OF AYLESFORD v. EARL POULETT. Lindley, L.J.

Eagle Company. To the extent of the mortgages so paid off nothing passed in the shape of cash, the sum actually advanced to the trustees by the *Eagle Company* being only £40,000. The question before us is whether the trustees are to be allowed to charge in their account a scale fee of £455, being the fee for negotiating loan and investigating title on a mortgage for £232,000. The question turns on the rules under the *Solicitors' Remuneration Act*, 1881, Schedule I., Part I., and rule 10 in that schedule. By the first part of the schedule a mortgagee's solicitor is entitled to a scale fee "for negotiating loan," and to another scale fee "for investigating title to freehold, copyhold, or leasehold property, and preparing and completing mortgage." Then rule 10 provides that, "The above scale as to mortgages is to apply to transfers of mortgages where the title is investigated, but not to transfers where the title was investigated by the same solicitor on the original mortgage or in any previous transfer; and it is not to apply to further charges, where the title has been so previously investigated. As to such transfers and further charges, the remuneration is to be regulated according to the present system as altered by Schedule II. hereto. But the scale for negotiating the loan shall be chargeable on such transfers and further charges where it is applicable." The Taxing Master having allowed only the scale fee on £40,000, the Defendants carried in this objection: "The item of £1255 should have been allowed at £455, being the amount according to the scale authorized by the *Solicitors' Remuneration Act*, 1881, upon a mortgage for £232,000. The mortgage for the £232,000 was a new and independent transaction, and entirely distinct from the mortgage for £192,000 which previously existed on the life estate." The Taxing Master answered: "The solicitors have already been once paid for investigating the title, at least on £192,000, part of £232,000—that is, on the life estate. On the present occasion an additional £40,000 was advanced—no doubt this time on the fee. But the transaction was between the same parties, and, as before observed, the proper fee had been already paid for investigating the title. On the present occasion, the Defendants are really entitled to nothing more than the proper charges under Schedule II., and I invited them to bring in such

items. This they declined to do, contending that they were entitled to be allowed the full scale item on £232,000. In these circumstances I have, with the assent of the Plaintiff's solicitors, allowed them £145, being the scale fee on £40,000, which is in my judgment much more than the Defendants would be allowed if items were brought in under Schedule II." This appears to proceed on the theory that this mortgage is a further charge within rule 10. It cannot be contended that it is a transfer; but the Taxing Master treated it as a further charge on property the title to which had been previously investigated by the same solicitor. Now, no doubt the title had been investigated on behalf of the *Eagle Company* when they advanced the £192,000; but the question is whether the transaction can be considered a further charge. I think that it cannot. I will not sacrifice substance to form; but it appears to me that the deed of the 7th of August, 1883, was really and in substance a new mortgage under the statutory power given to the trustees, and cannot be treated as a deed of further charge. It is not on the same property, being a mortgage in fee of part of the property, whereas the former mortgages were on the interest of the tenant for life in the whole of the property; and it was not made by the same parties, being made by the trustees, and not by the tenant for life. It is then, in my opinion, nothing but a new mortgage for £232,000. It is true that only £40,000 was advanced in cash; but that does not make the transaction a further charge for £40,000. It is a new mortgage in fee for £232,000, and falls within Schedule I., and the scale fees for negotiating a loan of that amount and for investigating title, and preparing and completing mortgage, must be allowed.

BOWEN, L.J.:—

Rule 10 of Schedule I. is both affirmative and negative; and if the present case is within the rule it must fall within the second part of it, viz., that the scale is not to apply to further charges where the title has been previously investigated. But to bring the present case within those words, it must be made out that this is a deed of further charge, which in my opinion it is not.

C. A. 1890 EARL OF AYLESFORD v. EARL POULETT.

FRY, L.J.:—

If we had a discretion as to the taxation of costs, I am not sure that I should not agree with the Taxing Master and Mr. Justice *North*. But the *Solicitors' Remuneration Act*, 1881 (44 & 45 Vict. c. 44), s. 7, enacts that so long as any general order under the Act is in operation the taxation of solicitors' bills of costs shall be regulated thereby. We have, therefore, no discretion to depart from the terms of the order. The present instrument cannot fall within rule 10 unless it is a transfer or a further charge. It cannot be contended that it is a transfer, and I am of opinion that it is not a further charge. The trustees were bound to raise money by mortgage of the estate, and apply the money in paying off the subsisting charges on the life interest. The instrument by which they raised the money is a new mortgage, and cannot be held a further charge because only a part of the sum raised was actually advanced in cash. I am of opinion therefore, that the appeal succeeds.

Solicitors: *Kaye & Guedalla; Bennett, Dawson, & Bennett.*

H. C. J.

C. A. 1890 KEKEWICH, J. *March* 27. C. A. *Dec.* 5, 8.

In re LASHMAR. MOODY *v.* PENFOLD.

[1890 L. 245.]

Real Estate—Devise in Trust—Failure of Heir of Beneficiary—Legal Estate—Right to Call for Conveyance.

Under the will of *A.*, who died in 1859, *B.* was entitled, subject to certain life interests, to an equitable reversion in fee in a freehold messuage, the legal estate in which was vested in *P.* and two other persons as the trustees of *A.'s* will.

B., who died in 1868, by his will devised all his real and personal estate to *M.* and another person upon trust to pay to his wife or to permit her to receive the annual produce thereof during her life or widowhood, and after her death or second marriage, upon trust for his (*B.'s*) son *George H.*, his heirs, executors, administrators, and assigns; and *B.* empowered his trustees with his wife's consent in writing, and after her death and during the minority of his said son, in their discretion, to sell any part of his real estate, and to convey it to the purchaser.

George H., who was illegitimate, attained twenty-one, and died intestate and without issue in 1880.

B.'s widow died in 1886; and upon the death, in 1889, of the survivor of the persons entitled to life interests in the freehold messuage, *M.*, the surviving trustee of *B.'s* will, claimed to have become absolutely entitled to the freehold messuage, and called upon *P.*, who was in possession thereof as the surviving trustee of *A.'s* will, for a conveyance thereof:—

Held, by the Court of Appeal (reversing the decision of *Kekewich*, J.), that *M.* was not entitled to call for a conveyance from *P.* of the freehold messuage in question.

Doe v. *Biggs* (1) criticised and doubted.

Onslow v. *Wallis* (2) distinguished.

APPEAL from Mr. Justice *Kekewich*.

Peter Lashmar by his will, dated the 23rd of November, 1858, after appointing his brother *Thomas Lashmar*, and his nephew the Defendant *William Penfold*, and *John Lashmar*, executors and trustees thereof, gave, devised, and bequeathed (subject to the payment of his debts, funeral and testamentary expenses) "all the real and personal estate of which I may be possessed, or to which I may become entitled at my decease, unto the said *Thomas Lashmar*, *William Penfold*, and *John Lashmar*, their heirs, executors, administrators, and assigns," upon the several trusts thereinafter expressed concerning the same respectively—then followed gifts and bequests of specific portions of the testator's real and personal estate—"or the monies arising from the sale and conversion thereof respectively"; after which the testator gave, devised, and bequeathed three messuages in *High Street*, *Steyning*, one of which was a freehold house then in the occupation of *Thomas Lashmar*, "unto the said *Thomas Lashmar* and *Jane* his present wife, during their respective lives, upon the express condition of their keeping the said properties respectively in tenantable repair, and of continuing the several insurances of the same to the present amounts; and after the death of the survivor of them . . . . as to the house and premises in the occupation of the said *Thomas Lashmar*, I devise the same to my said nephew *John Lashmar* for his life, and on his death unto *Charles Lashmar*, the nephew of the said *John Lashmar*, absolutely in fee simple."

Peter Lashmar died on the 4th of November, 1859.

(1) 2 Taunt. 109. (2) 1 Mac. & G. 506.

C. A. 1890 *In re* Lashmar. Moody *v.* Penfold.

John Lashmar died on the 25th of March, 1875.

Thomas Lashmar died on the 10th of April, 1881; and *Jane Lashmar*, his wife, died on the 4th of November, 1889.

Charles Lashmar died on the 6th of August, 1868, and his will, which was dated the 5th of August, 1868, was so far as material as follows: "I give, devise, and bequeath unto *John Lashmar* of *Tandridge*, farmer, and *John Moody* of *Redhill*, wheelwright, all my real and personal estate upon trust, to pay to my wife, *Ann Lashmar*, or to permit her to receive during her life or widowhood, the dividends, interest, and other annual produce thereof, and from and after her decease or second marriage, whichever shall first happen, upon trust for my son *George Hartnup*, commonly called *George Hartnup Lashmar*, his heirs, executors, administrators, and assigns, according to the respective natures thereof, and I empower my said trustees with the consent in writing of my said wife, and after her decease and during the minority of my said son, in the discretion of my said trustees, to change from time to time the investments of any of the stocks, funds, shares, or securities, in which any of my estate may be invested, for any other kind of investment authorized by law. I further empower my said trustees or trustee, if they or he shall think it advantageous so to do, at any time or times, with the consent in writing of my said wife, and after her decease and during the minority of my said son, in the discretion of my said trustees or trustee, to sell my real or personal estate, or any part or parts thereof, by public sale or private contract, and to convey the estate so sold unto or according to the direction of the purchaser or purchasers thereof, with power to make any special conditions of sale as to the title or evidence of the title or otherwise; and with power to buy in the premises at any public sale and to rescind, either on terms or gratuitously, any contract, and to re-sell without being answerable for any loss. And I direct that my trustees or trustee shall invest the money to arise from the sale thereof in manner hereinbefore directed, and shall hold the funds or securities whereon such investment shall be made upon the trust hereinbefore contained. And I appoint the said *John Marchant Lashmar* and *John Moody* to be my executors."

George Hartnup, the son of *Charles Lashmar*, was illegitimate and he died intestate and without issue on the 17th of July, 1880. *Ann Lashmar* died on the 6th of October, 1886.

The house and premises in *High Street, Steyning*, in the said will of *Peter Lashmar* described as then in the occupation of *Thomas Lashmar*, were occupied and enjoyed by the said *Thomas Lashmar* and *Jane*, his wife, and the survivor of them, down to the death of *Jane Lashmar* in November, 1889. Shortly after her death, the Plaintiff, *John Moody*, the surviving trustee of the will of *Charles Lashmar*, applied to the Defendant, *William Penfold*, the surviving trustee of the will of *Peter Lashmar*, in whose possession the house and premises above mentioned then were, and made claim to have become absolutely entitled to such house and premises, and to have the right to call for a conveyance thereof. The Defendant then communicated with the Solicitor to the Treasury with the view of ascertaining whether any claim would be made on behalf of the Crown, but was informed that, as the bastard's interest in the real property in question was equitable only, and as the bastard had died before the passing of the *Intestates Estate Act*, 1884, it was not considered that there had been an *escheat* to the Crown.

After some further correspondence, the Plaintiff took out an originating summons against the Defendant under Order LV., rule 3 (*g*), to have it determined by the Court whether, according to the true construction of the will of *Peter Lashmar*, the legal estate in the house and premises aforesaid passed to the trustees of the said will, or whether such legal estate passed to the persons named as specific devisees of the said property; and, in case such legal estate was held to be vested in the trustees of *Peter Lashmar*, then whether the Plaintiff, as the sole surviving trustee of the will of *Charles Lashmar*, was entitled to call for a conveyance of the said house and premises from the Defendant.

This summons, after being adjourned into Court, came on before Mr. Justice *Kekewich*, sitting for Mr. Justice *Kay*, on the 27th of March, 1890.

Haldane, Q.C., and *Abraham*, for the Plaintiff:—

It is submitted that the legal estate in this property did not

C. A. 1890 *In re* LASHMAR. MOODY *v.* PENFOLD.

pass to the Defendant under the will of *Peter Lashmar*, but is vested in the Plaintiff under the will of *Charles Lashmar*; but even if the legal estate passed by the first will, yet the Plaintiff, as surviving trustee under the will of *Charles Lashmar*, is entitled to call for a conveyance by the Defendant. The case is governed by *Onslow* v. *Wallis* (1), which shews that the Defendant, as trustee of the will of *Peter*, is not concerned with the question how the property will be disposed of in consequence of the Plaintiff, as trustee of the will of *Charles*, being unable to carry out the directions of that will, but is bound to give effect to the title which the Plaintiff has acquired by virtue of that will. [They referred also to *Burgess* v. *Wheate* (2).]

Renshaw, Q.C., and *Hatton*, for the Defendant:—

Under the will of *Peter*, the legal estate in this house is in the Defendant, and the Plaintiff has no right to take it away from him. The devise to the trustees of the will of *Peter* is expressed to be "subject to the payment" of his debts, &c.; that is not a mere charge, but a direction to pay, and sufficient, according to the authorities, to give them the legal estate; and this construction is aided by the fact that the trustees are also appointed executors: *Creaton* v. *Creaton* (3); *Smith* v. *Smith* (4); *Spence* v. *Spence* (5); *Kenrick* v. *Lord Beauclerk* (6); and other cases cited in *Jarman* on Wills (7).

[KEKEWICH, J., referred to *Marshall* v. *Gingell* (8).]

The will of *Charles Lashmar* is very differently worded, and we submit that, according to the true construction of it, the legal estate in any lands of which that testator was seised would have passed to the beneficial devisees, and not to the trustees. The trustees are directed not merely to pay "the income to the tenant for life," but to pay "or permit her to receive" it; and it is well settled that under that form of gift the beneficial devisees take the legal estate: *Doe* v. *Biggs* (9). The power

(1) 1 Mac. & G. 506; affirming S.C., 16 Sim. 483.
(2) 1 Eden, 177; 1 W. Bl. 123.
(3) 3 Sm. & Giff. 386.
(4) 11 C. B. (N.S.) 121.
(5) 12 C. B. (N.S.) 199.
(6) 3 Bos. & P. 175.
(7) 4th Ed., vol. ii., p. 296.
(8) 21 Ch. D. 790, 795.
(9) 2 Taunt. 109.

of sale given to the trustees took effect as a mere common law authority, and not by any reference or implied reference to the *Statute of Uses*. The argument that such a power is inconvenient cannot prevail: *Kenrick* v. *Lord Beauclerk* (1). Moreover, the power is only exerciseable during the life of the widow or the minority of the son, *i.e.*, during the period when it was essential that there should be some one to protect the property. The direction as to investment does not carry the matter further, for that direction was only operative after the realty had been converted into personalty. In *Cunliffe* v. *Brancker* (2), the legal estate was held to be in the beneficial devisees, notwithstanding that the trustees were empowered to convey in exchange or upon partition: see also *Sugden* on Powers (3).

The result is that *Onslow* v. *Wallis* (4) has no application, because even if the Plaintiff's testator, *Charles Lashmar*, had had the legal estate, it would not have passed to the Plaintiff.

KEKEWICH, J. (without calling for a reply, said):—

In this case the question which I have to decide is, whether there is any person entitled under the will of *Charles Lashmar*, who has, or can call for, the legal estate in certain freehold property. If the trustee of that will has already got the legal estate, then he is entitled to hold the property, there being no person interested under the will who can call for a conveyance from him. If, on the other hand, he has not got the legal estate, but is entitled to call for it, he is in no worse position, except that the legal estate has to be conveyed. But if no person claiming under the will of *Charles Lashmar* is entitled to call for the legal estate, and the legal estate is outstanding, outstanding it must remain, because the trustee or other person in whom it is vested is entitled to hold it until some person in authority calls for a conveyance of it. If there be no such person, it must remain where it is. That is the general outline of the case.

As regards the first point raised by Mr. *Renshaw*, I am of opinion that the legal estate did pass by the will of the first testator, *Peter Lashmar*. The words of the will on which reliance

(1) 3 Bos. & P. 175.
(2) 3 Ch. D. 393.
(3) 8th Ed. p. 147.
(4) 1 Mac. & G. 506.

C. A. 1890 *In re* LASHMAR. MOODY *v.* PENFOLD. Kekewich, J.

was placed in argument, and on which it is possible to rely in deciding the question, are few. The property is given to the trustees, "subject to the payment of" the testator's "debts, funeral and testamentary expenses." The devise and bequest comprises the whole of the testator's real and personal estate, and there is nothing at all to shew whether he intended that the trustees should have the legal estate or not, except this circumstance, which I pointed out to Mr. *Renshaw* in the course of the argument, and which has been adverted to in many cases, that the trustees are also the executors of the will. That seems to me inconsistent with the view that a mere charge of debts was intended. If there were different persons named as devisees of real estate and as executors having power over personal estate, then the subjecting of the real estate to the payment of debts might be merely in favour of those whose duty it was to pay the debts. But when there is such a charge or direction as is contained in this will, and the trustees and executors are the same persons, then it seems to me that the devise must carry the legal estate in order that the trustees may discharge the duty imposed upon them, and that construction is consistent, and in accordance with the cases which have been cited of *Creaton* v. *Creaton* (1) and *Spence* v. *Spence* (2), and the case of *Marshall* v. *Gingell* (3), before Mr. Justice *Kay*.

The legal estate, then, being in the trustee of the first will, did the right to call for a conveyance of it pass to the trustees under the second will? That is a more difficult question. Mr. *Renshaw* has cited to me an authority, which I believe has never been questioned, to shew that a gift by a testator to trustees or to persons in trust to pay to a widow or other devisee or to permit her or him to receive the income is not a sufficient indication of an intention that the legal estate should be vested in the first devisees; and here the only gift subsequent to the gift in favour of the widow for life is to *George Hartnup*, whose estate or interest under the circumstances has never taken effect in possession. It is a direct gift to him under which, no doubt, he could take the legal estate; but that is followed by an elaborate power of sale,

(1) 3 Sm. & Giff. 386. (2) 12 C. B. (N.S.) 199.
(3) 21 Ch. D. 790.

C. A. 1890 *In re* LASHMAR. MOODY *v.* PENFOLD. Kekewich, J.

worded in accordance with the ordinary conveyancing form, which enables the property to be sold with the consent of the widow, and after her decease and during the minority of *George*, at the discretion of the trustees, who are directed to convey the estate sold and to receive the money to arise from the sale and hold the investments upon the trusts before declared of the unconverted real estate. The argument is that that may be construed as a common law power of sale. Well, it is true that, if driven to it, the Court may construe it as a common law power. It is possible also to construe it as a power of revocation, and new appointment, by reference to the *Statute of Uses*. But I cannot exclude from my mind my own knowledge and experience how these powers generally are framed, and the great distinction between a power of this kind and a common law power, such as is sometimes, or used sometimes to be, adopted. It seems to me there is here a distinct indication of intention that the trustees should be in a position to sell and give receipts. And the persons to whom this power is so given are also executors. That, I think, is an indication of an intention that they should take the legal estate.

Although, therefore, the trustee of the second will has not got the legal estate, yet his testator was entitled to call for a conveyance of it, and, if I am right in my construction of that will, the result is, that the trustee, as devisee under that will, is entitled to call for a conveyance, according to the decision in *Onslow* v. *Wallis* (1), which appears to be directly in point, and there being no person who can hold as against him he is entitled to hold it for himself against the trustee of the first will; and, therefore, my decision must be in favour of the Plaintiff.

C. C. M. D.

C. A.

The Defendant appealed. The appeal was heard on the 5th of December, 1890.

Renshaw, Q.C., *Hadley*, and *Hatton*, for the Appellant:—

The question turns upon the true effect of *Charles Lashmar's* will, and may be tried by considering in whom the legal estate

(1) 1 Mac. & G. 506.

C. A. 1890 *In re* Lashmar. Moody *v.* Penfold.

would, under that will, have vested, if it had been in *Charles*, the testator. We contend that it would have vested in the beneficiaries, and not in the trustees; and, consequently, that *Moody* cannot ask for a conveyance. As to the life interest given to the widow, the case falls within the authority of *Doe* v. *Biggs* (1) and *Baker* v. *White* (2). But, even if those cases are distinguishable, still the will gives no estate in fee simple to the trustees, but at the utmost an estate for the widow's lifetime. The power to sell during the minority of *G. Hartnup* is a common law power. The circumstance that real and personal estate are united in the same gift is immaterial: *Baker* v. *White*. Besides, if our present contention is wrong, still there is no equity in *Moody* to call for a conveyance. No trusts have to be performed by him, and this distinguishes the case from *Onslow* v. *Wallis* (3). There the trustee had debts to discharge.

Haldane, Q.C., and *Abraham*, for the Respondent, made use of the same arguments that they had urged in the Court below, and in addition to the authorities there cited referred to *In re Tanqueray-Willaume and Landau* (4), *Watson* v. *Pearson* (5), and the *Wills Act*, sect. 30.

1890. Dec. 8. Lindley, L.J.:—

In this case a controversy has arisen as to which of two trustees is to keep certain property which was not intended for either of them. Mr. *Penfold* is in the happy position of having got it, and the question is whether anybody is entitled to take it away from him, and, in particular, whether Mr. *Moody* is entitled to take it away from him. The learned Judge has decided this question in Mr. *Moody's* favour, and when the appeal was opened and for a considerable time afterwards I was disposed to think that that decision was right. But Mr. *Hadley* has convinced me, and further reflection has confirmed the conviction, that the decision is wrong, and that the person who is in possession must keep what he has got.

(1) 2 Taunt. 109.
(2) Law Rep. 20 Eq. 166.
(3) 1 Mac. & G. 506.
(4) 20 Ch. D. 465, 477.
(5) 2 Ex. 581, 593.

The question arises in this way. Under the will of *Peter Lashmar*, which was dated in 1858, *Charles Lashmar* was entitled to an equitable reversion in fee in certain property, the legal estate of which was vested in *William Penfold*, who was the surviving trustee of *Peter Lashmar's* will. *Charles Lashmar* made a will, which I will shortly read. [His Lordship then stated this will, and continued:—] Now the question is, upon that will, what interest (if any) the surviving trustee, *William Moody*, takes in this property; and I cannot find, after spelling over the will with all the care I can, that he is, or rather was, anything more than a bare trustee for *George Hartnup*. It is quite obvious that, as soon as Mrs. *Jane Lashmar*, the surviving tenant for life, died, and *George Hartnup* attained twenty-one, that *Moody* had no duty whatever to perform. He had a power of sale during the life of the tenant for life, and also during the minority of *George Hartnup;* but after the tenant for life was dead, and *Hartnup* had attained twenty-one, he was simply a bare trustee, having no duty whatever to perform. Now, supposing that which is not the fact, that the testator had been entitled to the legal estate in this property, it appears to me that the legal estate to that property would, after the death of the widow, have vested in *George Hartnup*, and not in this trustee.

Reliance was placed on *Doe* v. *Biggs* (1). Now *Doe* v. *Biggs* is one of those cases which may be classed as anomalies, and it is so known to and understood by conveyancers and real property lawyers, who take care to draw instruments accordingly. I do not think it is a sensible decision. I do not think that case could possibly be so decided now if the question arose for the first time; and I am not disposed to extend it. On the other hand, I do not wish to shake titles, and I shall do precisely what our predecessors have always done—leave the case where it is. It is a rock ahead that everybody knows. I am not prepared to extend that case, and, in that spirit, I am not at all prepared to say that these trustees did not take the legal estate during the life of the testator's widow. I think they did, notwithstanding *Doe* v. *Biggs*; but be that as it may, Mr. *Hadley* has convinced me that upon the true construction of this will, *Moody*, the trustee

(1) 2 Taunt. 109.

C. A. 1890 *In re* LASHMAR. MOODY *v.* PENFOLD.

under it, having no duty whatever to discharge, and having nothing on earth to do with the property, cannot take the house in question from *Penfold*, who has got it. It appears to me that the true way to regard this will is to look through *Moody* as nobody. So it comes to this. The property is in *Penfold* on trust for nobody at all. Therefore, he keeps it; and accordingly the appeal must be allowed.

BOWEN, L.J.:—

I am entirely of the same opinion. The argument of Mr. *Hadley* has convinced me of the justice of the decision, at which, in common with my Brother Lord Justice *Lindley*, I have arrived. I think on the true construction of the will of *Charles Lashmar*, if there had been a legal estate to pass, the legal estate would have passed during the wife's life to the trustees. I do not know that it is necessary to decide the point; but that is my opinion.

Doe v. *Biggs* (1) is a case of some antiquity, and the last thing this Court does is to disturb cases upon which conveyancers may have relied; but I do not think the principle upon which *Doe* v. *Biggs* was decided was a sound one, and I agree with the late Master of the Rolls that the case is not one the precedent of which is really applicable to other cases. In most cases there is sure to be a context which displaces the conclusion at which the Court arrived in that instance; although I think in itself, that even without context, the conclusion was open to considerable difficulty. Assuming the legal estate would have passed during the wife's life to the trustee, it seems to me that on the wife's death and the majority of the infant the trustee had nothing more to do; it became a bare trust.

FRY, L.J:—

The question which has to be determined here is simply whether or no an equitable interest in real estate which was vested in *Charles Lashmar* did or did not pass by his will to his son *George Hartnup*. Now I agree with my learned Brother in thinking that it did pass. It appears to me that the construction of the

(1) 2 Taunt. 109.

will shewed that either it passed immediately on his death to his widow and to his son in remainder, or that, in any event, it passed on the death of the widow when the remainder took effect in possession.

The testator devised and bequeathed the whole of his real and personal estate to *John Lashmar* and *John Moody* upon trust to pay to his wife or permit her to receive during her lifetime the annual produce of the property. Now, undoubtedly, according to the decision in *Doe* v. *Biggs* (1), that would not give the legal estate to the trustees, but would vest it in the wife. Whether in this case, by force of the powers which followed, that decision would or would not apply, appears to me to be a point upon which I need express no opinion; but, assuming in favour of the Respondent that it does apply during the lifetime of the wife, the question arises with regard to the remainder. Now the will goes on in these terms—"from and after her decease or second marriage, upon trust for my son *George Hartnup*, his executors, administrators, or assigns, according to the respective natures thereof." Now, it is observed, that it is not a trust to convey, which would be the appropriate and proper trust if the legal estate had been vested in the trustees; but it is a trust "for." There is nothing to be done by trustees in that respect—no active duty to be performed at all. In my judgment the trusts of the will came to an end with the sentence that I have read. All the rest is power. It is in express terms power: "I 'empower' my trustees to do this"; "I 'empower' my trustees to do that." Those powers continued during the lifetime of the wife and during the minority of the son, and after that they have no effect; and, it appears to me, therefore, that there is no active trust, no active duty whatever to be performed by the trustees—at any rate, after the death of the wife—as trustees. Whatever they are to do during the minority they are to do in their character as donees of the power.

I think, therefore, that no estate remained in the trustee. The whole equitable estate vested by force of this will in the testator's son; and *John Moody* has no title to claim the conveyance from the trustee of *Charles's* will.

(1) 2 Taunt. 109.

C. A. 1890 In re LASHMAR. MOODY v. PENFOLD.

Renshaw, Q.C. :—We are willing that the costs should be dealt with as in the Court below—that the Respondent should have his costs as a charge on the estate.

LINDLEY, L.J. :—We have no objection if you agree.

I think, perhaps, I ought to say with respect to *Onslow* v. *Wallis* (1), on which I think Mr. Justice *Kekewich* decided this case, that there the trustee had duties to perform, and if this gentleman had any duties to perform our decision would have been the other way. It is because he has none that we decide as we have done.

Solicitors: *Burton, Yeates, Hart, & Burton*, agents for *G. A. Flowers, Steyning*; *E. J. Maude.*

W. W. K.

C. A. 1890 KEKEWICH, J. *March* 7, 8, 10, 11, 15, 17, 18. C. A. *Nov.* 18, 19, 20, 21; *Dec.* 16.

SIMMONS *v.* LONDON JOINT STOCK BANK.

[1888 S. 2458.]

LITTLE *v.* LONDON JOINT STOCK BANK.

[1888 L. 1495.]

Bankers—Deposit of Securities by Broker—Foreign Bonds payable to Bearer—Negotiable Securities—Bonâ fide Holder—Sale by Bankers—Measure of Damages.

The Plaintiff *S.* entrusted *D.*, a stockbroker, with bonds of a foreign company payable to bearer. *D.* sold the bonds without the Plaintiff's authority, and repurchased others of the same kind, which he entered by their proper numbers in his books as the Plaintiff's bonds, and pledged them, together with securities belonging to other customers with the Defendant bank, to cover an advance to himself.

The Plaintiff *L.* employed *D.* to purchase for him shares in a foreign company transferable by delivery of the certificates, shares in an English company transferable in like manner, and bonds of a foreign government payable to bearer. In the case of the shares in the English company *D.* substituted others of the same kind for those purchased for *L.*, and then deposited the substituted shares in the English company, and also the shares in the foreign company and the bonds of the foreign government, together with securities belonging to other customers, with the Defendant bank to cover an advance to himself. In each case the docu-

(1) 1 Mac. & G. 506.

ments were entered by their proper numbers in *D.'s* books as belonging to *L.*

D. became insolvent, and the Defendants sold the securities deposited with them in discharge of his debt to them.

S. and *L.* brought actions against the Defendants, claiming a return of their securities or payment of their value. It was admitted that all the above-mentioned bonds and shares were transferable by delivery, and passed from hand to hand on the *London Stock Exchange.*

Held, (1.) that an authority to a broker to pledge a customer's securities does not (in the absence of an express power to that effect) authorize the broker to pledge them *en bloc* with those of other persons to raise a lump sum;

(2.) That the true inference from the course of dealing between the Defendant bank and *D.* and the other facts of this case was, that the Defendants were aware that the bonds and shares deposited might probably not belong to *D.*, but to one or more of his customers, and took for granted that he was authorized to pledge them; but that they did not believe *D.* was authorized by his customers to pledge their securities *en bloc* together with other securities belonging to other persons to raise a lump sum on the whole;

(3.) That, assuming that the bonds and shares were negotiable securities in the legal sense of the term, the Defendants were not, under these circumstances, *bonâ fide* holders of them without notice;

(4.) That the bonds and shares which had been purchased by *D.* to replace those of the Plaintiffs were substituted for the original bonds and shares, and became the property of the Plaintiffs before the deposit with the bank;

(5.) *Held*, also, that the measure of the Defendants' liability was the price of the securities realized, with 4 per cent. interest from the date of realization.

But, *quære*, whether the above-mentioned bonds and shares were negotiable securities in the proper sense of the term.

"Negotiable securities" defined.

The judgment of *Kekewich*, J., affirmed.

C. J. SIMMONS, the Plaintiff in the first of these actions, on the 29th of November, 1886, bought, through the firm of *Delmar & Son*, who were then acting as his stockbrokers, bonds of the *Buenos Ayres Land Mortgage Bank* of the "J" series, for the amount of $15,000, such bonds being generally known on the *Stock Exchange* as "*Cedulas.*" The Plaintiff paid £2242 10*s.* for the bonds, through his brokers, and allowed them to remain in the brokers' hands for safe custody.

On the 25th of January, 1887, the Plaintiff sold, through *Delmar & Son*, some of the bonds amounting to $12,000, and bought the same amount through them for the account of the

C. A. 1890 SIMMONS v. LONDON JOINT STOCK BANK. LITTLE v. LONDON JOINT STOCK BANK.

10th of February. On the 1st of February the business of *Delmar & Son* was transferred to the firm of *Herapath, Delmar & Co.*, and the Plaintiff left the *Cedula* bonds in the hands of the new firm.

On the 12th of October, 1887, *Delmar*, one of the members of the firm, for the purpose of obtaining a temporary advance, and, without any authority from the Plaintiff, sold the Plaintiff's bonds to Messrs. *Prior & Williams* for £1860, and on the same day made a contract to purchase similar bonds to the value of $15,000 on the 28th of October, for which he paid £1845, which was the market price. On the 28th of October, *Delmar* delivered the Plaintiff's bonds to the purchasers, received the new bonds, and altered the numbers of the Plaintiff's bonds in the books of the firm to correspond with them.

Delmar had an account with the Defendant bank; but on the 28th of October his account was overdrawn, and, in order to provide money to meet the cheque by which he paid for the *Cedula* bonds purchased by him, he deposited with the Defendant bank the bonds which he had purchased, together with other securities belonging to other customers of his firm, on receipt of which the bank placed £6000 to their credit. Out of this sum *Delmar's* cheque was paid. In February, 1888, *Herapath, Delmar & Co.* sold one of the bonds for $1000 at the request of the Plaintiff, and accounted to him for the money, and they also paid him the amount of the coupons for interest on the remaining bonds till the 14th of June, 1888, when the firm suspended payment, and were declared defaulters on the *Stock Exchange*. *Delmar* then left the country. Thereupon, the Plaintiff, having ascertained that the bonds in question had been deposited with the Defendant bank, applied to them for a return of the bonds, to the amount of $14,000; and, on their refusal to account to him for them, he brought the present action against the bank, claiming a declaration that the bonds were deposited with the Defendant bank in fraud of the Plaintiff, and claiming a return of the bonds, or payment of the value if they had been sold, and for damages.

The Plaintiff stated in his statement of claim that the course of dealing pursued by the Defendant bank in their dealing with

brokers and money-dealers in a large way of business in the city of *London* was as follows. Brokers or dealers requiring advances deposited with the bank securities quoted on the *Stock Exchange* the market value of which exceeded in a certain fixed proportion the amount of the advances. If the cover for the loan exceeded the required margin, the brokers were allowed to withdraw securities to the value of the excess; and if the cover, by reason of changes in the market values, fell below the required margin, brokers were required to find further cover. The officers of the bank were throughout the transactions aware that the brokers and dealers, to whom the loans were made required the same in order to make advances to their own customers, and that the securities deposited with the bank were mainly, if not entirely, the property of such customers; and with this knowledge the bank gave every facility for the exchange of the securities deposited with them, allowing the brokers and dealers to withdraw considerable portions of the same on the morning of any settling day on the *Stock Exchange*, and on an undertaking to restore securities of not less value at the close of such settling day. They also alleged that the bank had notice, not only from this general course of business, but also from the particular transactions between them and the Plaintiff's brokers, that the securities deposited with them by the Plaintiff's brokers were the securities of the customers of such brokers; and, in the belief that the brokers who brought them had made sufficient advances to justify them in obtaining the amount borrowed from the bank, and relying on the integrity of the brokers, the bank made no specific inquiries as to the ownership of the securities, or the authority, if any, which the brokers had to deposit the same, and the interest which the brokers had therein by reason of their advances to their customers.

The Defendant bank, in their defence, stated that they had sold all the bonds in question, together with the other securities deposited by *Delmar's* firm, at the market price to cover their loan to the firm, and had applied the bonds in payment of the debt. They alleged that the bonds were payable to bearer, and that such bonds payable to bearer and issued by railway, banking, and other companies, and by foreign governments and

C. A. 1890 SIMMONS v. LONDON JOINT STOCK BANK. LITTLE v. LONDON JOINT STOCK BANK.

corporations, had been well known to, and widely dealt in by bankers, money-dealers, and stockbrokers. For over sixty years it had been the usage of such bankers, money-dealers, and brokers to buy and sell such bonds, and advance money on the security of them, and to pass these bonds in such dealings by mere delivering as negotiable instruments transferable by delivery, and that this usage had been recognised by the foreign governments and corporations issuing the same, and they insisted that they had taken the bonds in question from *Delmar's* firm in good faith and for value, and became lawful holders thereof as *bonâ fide* purchasers without notice of the Plaintiff's title. They admitted that they did not make any inquiries as to the title of *Delmar's* firm to the securities, and contended that they were not bound to make them, and that there was nothing to suggest to them the necessity of so doing.

On the trial of the action both parties went into evidence in support of their case. In the course of the evidence, it was admitted by the Plaintiff's counsel that the bonds were tranferable by delivery, but not that they were negotiable securities in the legal sense of the term.

LITTLE *v.* LONDON JOINT STOCK BANK.

This was a similar action, to recover three sets of shares and securities:—

(1.) Fifty shares in the *Imperial Ottoman Bank*, a *société anonyme* at *Constantinople*. The shares were of 500fr. each, and were transferable by delivery of the certificates. The fifty shares were bought by *Delmar* for *Little* in 1887, and paid for by *Little*. There was no dispute that these shares had been appropriated to *Little* in *Delmar's* books before they were deposited by him with the bank along with various securities belonging to different persons.

(2.) Seventy-five shares of £10 each in the *Rio Tinto Company, Limited*. This was an English company, and as regards these shares warrants stating that the bearer was entitled to the shares therein specified had been issued under the *Companies Act*, 1867 (30 & 31 Vict. c. 131), s. 27. On the 9th of April, 1887, *Delmar*, on behalf of *Little*, contracted to buy 100 such

shares from *Prior* and *Williams*. *Delmar* had also contracted to sell 110 such shares to *Prior* and *Williams;* so on the settling day *Delmar* had no *Rio Tinto* shares to receive from *Prior & Williams;* but through the clearing-house he received from *Gregg & Argenti* seventy-five shares on the 26th of April. He took these shares at once to the bank and deposited them along with other securities to cover his account. *Little* paid *Delmar* for them by two cheques, one on the 26th and the other on the 27th, and they were entered by their proper numbers in *Delmar's* books as belonging to *Little*.

(3.) Bonds of the Republic of *Uruguay*, which were in the following form: "The bearer of this bond is entitled to the principal sum of £——, part of the above-mentioned loan, and will be entitled to receive payment of the said principal sum on presentation, and against remainder hereof, and of all unmatured coupons, at the counting-house of Messrs. —— &c., in *London*, &c. Interest at the rate of £5 per cent. per annum on the said principal sum will be paid quarterly on the presentation of and against surrender of the corresponding coupon at the counting-house of Messrs. —— aforesaid in *London* . . . ."

On the 9th of March, 1888, *Delmar* bought for *Little* two *Uruguay* bonds, one of £1000 and the other of £500, for the account. *Delmar* received them on the account day, the 14th of March, and on the following day deposited them with the bank as security, along with other documents belonging to other customers. They were entered in *Delmar's* book on the 14th as purchased for *Little*.

On the 4th of April, *Delmar* bought for *Little*, *Uruguay* bonds to the nominal amount of £2500 for the account on the 12th, and *Little* paid for them on the 12th. It appeared, however, that *Delmar* did not receive them until the account on the 26th of April, on which day *Delmar* deposited them with the bank along with a number of other securities. They were entered in *Delmar's* books under the date of the 26th of April as received for *Little*.

Delmar on each settling day paid the balance due from him by drawing on the *London Joint Stock Bank*, and but for the advances which he obtained on the 26th of April, by means of

C. A. 1890

SIMMONS v. LONDON JOINT STOCK BANK.

LITTLE v. LONDON JOINT STOCK BANK.

the securities which he deposited, he could not have paid the amount which he had to pay on that day.

SIMMONS *v.* LONDON JOINT STOCK BANK.

This action came on for trial on the 7th of March, 1890.

Warmington, Q.C., and *Grosvenor Woods*, for the Plaintiff:—

On the facts, the case is entirely covered by the principle of the decision in *Earl of Sheffield* v. *London Joint Stock Bank* (1). These *Cedulas* were negotiable securities, and the Plaintiff is entitled to the substituted securities which *Delmar* bought on the 28th of October, 1887. He was a trustee of them for the Plaintiff: *London and County Banking Company* v. *London and River Plate Bank* (2); *Ex parte Cooke* (3); *Cooke* v. *Eshelby* (4).

Sir *Horace Davey*, Q.C., *Finlay*, Q.C., and *W. D. Rawlins*, for the Defendants:—

The *Earl of Sheffield* v. *London Joint Stock Bank* is a totally different case from the present. It is a decision on particular facts, and can only form a precedent in a precisely similar case. There is nothing to take this case out of the general law: *Goodwin* v. *Robarts* (5); *Williams* v. *Colonial Bank* (6). The transaction into which *Delmar* entered in October, 1887, was a sale and repurchase: *Bongiovanni* v. *Société Générale* (7) and the Defendants acquired a good title as purchaser for value without notice before any property in the substituted bonds vested in *Delmar*.

Warmington, in reply.

KEKEWICH, J.:—

The Plaintiff, seeking to make the Defendants liable for the value of the bonds in question sold by them, must prove that the bonds were his. That they were his in a sense of having been purchased by him or by his instructions, he does not say;

(1) 13 App. Cas. 333.
(2) 21 Q. B. D. 535.
(3) 4 Ch. D. 123.
(4) 12 App. Cas. 271.
(5) 1 App. Cas. 476.
(6) 38 Ch. D. 388.
(7) 54 L. T. (N.S.) 320.

for those which were so purchased and having been purchased were deposited by him with his brokers, were sold and delivered by them to strangers, and it is not suggested that they can be traced to the Defendants. But he says that the bonds in question were purchased under such circumstances that the property therein passed to him before they reached the Defendants' hands. The Plaintiff's brokers, whom I will refer to as *Delmar*, held on behalf of the Plaintiff bonds known as *Cedulas* (I drop the letter indicating the particular issue) of the nominal value of $15,000. It matters not whether they held them for safe custody or for any other purpose, for they certainly had no authority to sell or pledge. In October, 1887, they used these bonds, in fraud of the Plaintiff, for the purpose of raising money on their own account, and this they did by a method familiar to dealers on the *Stock Exchange*, which, whatever it may be technically styled, was a sale accompanied by a contract of repurchase. Whether regarded by the light of *Stock Exchange* rules, or apart from them, it was not a pledge. An essential term of a pledge is that on fulfilment by the pledgor of the conditions of the bargain, commonly called redemption, the pledgee is bound to hand back to the pledgor the very thing deposited with him; whereas on a sale and repurchase of bonds or similar securities the original owner, who is first vendor and then purchaser, can only claim on fulfilling the conditions of the bargain to be again made the owner of bonds identical in character and nominal value with those which he sold, and cannot insist on identity in numbers or other like particulars. The precise contract into which *Delmar* entered, when in October, 1887, he tortiously converted the Plaintiff's bonds to his own use, is not before me, but it undoubtedly was of this character; and, assuming it to have been fulfilled according to its terms, the legal consequences were those described by Lord Justice *Lindley* in the judgment of the Court of Appeal in *Bongiovanni* v. *Société Générale* (1). Therefore, when *Delmar* sold the bonds on the 12th of October, and delivered them pursuant to the contract, he parted with all property therein, and, assuming the contemporaneous contract of repurchase to have been fulfilled according to its terms, the property

(1) 54 L. T. (N.S.) 320.

C. A. 1890 SIMMONS v. LONDON JOINT STOCK BANK. LITTLE v. LONDON JOINT STOCK BANK. Kekewich, J.

in the bonds which *Delmar* was entitled to receive on the 28th of October remained in the person bound to deliver them until delivery, and then, and not before, passed to *Delmar*. If, in fact, the original contractor with *Delmar*, or some person subrogated to his rights and liabilities, delivered bonds pursuant to the contract to *Delmar* himself or any agent on his behalf, I entertain no doubt that they thereupon and thenceforth belonged to the Plaintiff in substitution for those tortiously sold. This conclusion may probably be arrived at by more ways than one; but it is sufficient to say that *Delmar* must be taken to have intended to repair the wrong done by him to the Plaintiff, and to have restored the bonds, or rather the equivalent of the bonds, with which he had parted, and that the Plaintiff's rights would immediately have attached to the restored or substituted bonds in *Delmar's* hand. Had the Plaintiff known what had been done he would, of course, have claimed the bonds; but without any such knowledge or claim, and despite his ignorance of the whole transaction, he must, according to the "artificial presumption founded on human nature," which is recognised in *London and County Banking Company* v. *London and River Plate Bank* (1), be taken to have accepted them. To the assumed facts that case is directly applicable, and, if they turn out to be substantially true, it is an authority in the Plaintiff's favour. I think they are substantially true. On behalf of the Defendants it is urged that there is no evidence to satisfy me when the number-book was altered, or for what purpose, or by whose instructions, and that in the absence of satisfactory evidence I ought not to treat it as a trustworthy record. To that I assent; but the answer to the argument, founded on this conclusion, was given by Mr. *Warmington* in reply. The entry under consideration is the last step in the transaction, and although this altered book necessarily raises suspicion, it cannot affect events or relations then practically complete. I must deal with the imperfect evidence of what took place as best I can, and, in determining what inferences are proper to be made, I must apply, as a jury would, such knowledge as I possess of the habits of business and of business men in such matters. These substituted bonds were

(1) 21 Q. B. D. 535.

paid for by means of *Delmar's* cheque, which could not have been met without an advance to the credit of his account, and that advance would not have been made unless he had given the security which included these very bonds. The inference most favourable to the Defendants is that the bonds must have been contracted to be pledged to the Defendants before delivery, and must have been paid for by a cheque which would have been dishonoured had that contract not been fulfilled. But it must also be treated as proved, or at any rate must be inferred, that the bonds were, in fact, delivered to *Delmar*; and though his title would have been defeated had the cheque been dishonoured, I think that by such delivery the property passed to him. He, having the bonds, held them on behalf of the Plaintiff, and, notwithstanding his contract, could not pledge them with the Defendants, except in fraud of the Plaintiff's rights. My conclusion on this point, therefore, is that the Plaintiff has discharged the burden of proving that the bonds in respect of which he sues were his, or, in other words, that he is entitled to say the Defendants sold his bonds. The identity of the bonds purchased by *Delmar* under the circumstances above mentioned with those pledged to the bank, and subsequently sold by the latter, is not disputed.

The more general, and therefore more important, question for decision turns less on the balance of evidence than on the application of settled principles to admitted or proved facts. By settled principles I mean those recognised by the House of Lords in *Earl of Sheffield* v. *London Joint Stock Bank* (1). It was argued on behalf of the Defendants that that decision turned entirely on the particular facts of the case, and has no bearing on the one before me, or indeed on any other not practically coincident in circumstances. I do not so regard it. The learned Lords who expressed opinions adopted, while commenting on, enlarging, and stating in their own language, the conclusions of fact arrived at by the Court below; but they considered that Court to have stopped short of the logical inference from their conclusions, and they gave reasons for that criticism, and stated what they deemed to be the right inference in terms equivalent, and, I

(1) 13 App. Cas. 333.

C. A. 1890 SIMMONS v. LONDON JOINT STOCK BANK. LITTLE v. LONDON JOINT STOCK BANK. Kekewich, J.

believe, intended to be equivalent, to legal propositions. It is true that the chief actor in that case, by name *Mozley*, was a money-dealer, and that the notice of his improper dealings with securities with which the House of Lords held the defendants to be affected depended in great measure on the ordinary business of a money-dealer and the knowledge which the defendants necessarily possessed of that business. This, however, was only a step towards the ultimate result. The knowledge which was held to put the defendants on inquiry happened to arise in that manner; but had it arisen otherwise the infirmity of their title would have been the same. I do not think it necessary to refer to many passages in the report in justification of this view of the case. Many might be quoted, but I am content with one by way of illustration. Lord *Bramwell* states the only question to be whether there was evidence on which there ought to be found notice of the infirmity of the title of those from whom the defendants claimed, and on the following page (1) he says: "The expression should be something like this: 'Notice of the infirmity of the pledgor's title, or of such facts and matters as made it reasonable that inquiry should be made into such title.'" Is there such notice here? That depends on the facts relating to this part of the case, which may thus be summarized. A large part of the business of the Defendant bank is to lend money to brokers on the deposit of securities. They have many brokers among their customers, and *Delmar* was one of them. So large is this part of their business that they keep a separate book called "Brokers' Securities Book," for the purpose. The loans to these brokers are generally made from settling day to settling day (a fact treated as significant in *Earl of Sheffield* v. *London Joint Stock Bank* (2)), and the bank affords them special facilities for withdrawing securities on the deposit of others of corresponding value on settling days or at other times. It is part of a broker's business (with which even if proof were absent I should suppose a bank whose head office is in the city of *London* to be reasonably well acquainted) to retain their clients' securities for safe custody, and it is also part of a broker's business not merely to buy and sell securities, but to lend money upon them. It is not

(1) 13 App. Cas. 346. (2) 13 App. Cas. 333.

usual for brokers to lend their own money, or to borrow on the securities of each client separately. What they do is to borrow on the securities of their clients *en bloc*, without mentioning their names or even indicating that any one but themselves is interested. The bank, on their part, do not know that any one else is interested, for they never ask questions, but assume that the brokers are acting within their authority. Mr. *Narraway*, the Defendants' manager, naïvely confessed that no useful purpose would be answered by asking questions, for the honest customer would be affronted, and the fraudulent one would give a satisfactory, though false, reply. I notice in passing that the same course is pursued in transactions with money-dealers; but it was attempted to be made out that it was also pursued when a merchant or other customer requires a loan in the ordinary course of business. The attempt failed, because though, of course, ordinary customers do occasionally require loans, and it is part of banking business to accommodate them, it could not be truthfully said that their transactions are at all similar to those with brokers as above described. This summary of the evidence brings the case, to my mind, directly within the authority of the case in the House of Lords, and proves that the bank, when making advances to *Delmar*, as one of their broker-customers, under such circumstances as are proved to have occurred (circumstances of ordinary occurrence in respect of like transactions), had notice of such facts and matters as made it reasonable that inquiry should have been made into his title. Title, in fact, as regards these *Cedulas*, he had none. It was conceded by the Plaintiff, or, if not conceded, it was proved, that *Cedulas* are negotiable securities within the rule of *Goodwin* v. *Robarts* (1); but, on the other hand, it was not contended that they would pass by delivery, except to a *bonâ fide* holder for value, without notice; and, if my conclusion be correct, the *Cedulas* in question did not so pass to the Defendants. The negotiable character of the bonds will not therefore avail them. I must notice two points raised on behalf of the Defendants. First, it is said that a decision in the Plaintiff's favour will make it henceforth impossible for brokers to raise money on deposit of

(1) 1 App. Cas. 476.

C. A. 1890 SIMMONS v. LONDON JOINT STOCK BANK. LITTLE v. LONDON JOINT STOCK BANK. Kekewich, J.

securities, and that so there will be interference with the business of two important sections of the mercantile community—brokers and bankers. I disclaim any such intention, and question the conclusion. If this or any other decision renders it more difficult for dishonest brokers to deal with securities by pledging those of one client to secure an advance to another or to themselves, the law will not be open to blame, nor will there be any occasion to regret the result. On the other hand, honest brokers, who only seek to raise money on their own securities, or securities which they have authority thus to deal with, will not be in any way impeded; for their title will be good, and they will have no real difficulty in persuading the banks of that fact. As regards bankers, it is well known that they rely at least as much on the responsibility of the borrower as on the value of the securities offered for a loan, and they must not complain if in the future they are obliged to be even more careful in that direction; nor, so far as I can see, need the necessity for greater care in anywise interfere with legitimate business. Secondly, it is said that there is an element of novelty in the case now made by the Plaintiff, raising a presumption of unsoundness, and in support of this view counsel referred to two cases in which the point, if sound, might well have been raised and decided. As regards one of them—*Williams* v. *Colonial Bank* (1)—I wish to say as little as possible, because it is a decision, and an erroneous decision, of my own, and, moreover, is now standing for judgment in the House of Lords. In that case there were certainly some available materials, and the point did not escape the observation either of counsel or the Court; but the decision of the Court of Appeal was then standing, and the point to which I am now adverting was excluded from more serious consideration than it actually received by one which seemed to me, and also to the Court of Appeal (though they took a different view of it) sufficient to dispose of the case. The other case referred to is *Goodwin* v. *Robarts* (2). I concur in the remark that the counsel by whom that case was argued for the appellant were not likely to have missed a point in favour of their clients; but, on the other hand, even they could not take one precluded by the admitted

(1) 36 Ch. D. 659; 38 Ch. D. 388. (2) 1 App. Cas. 476.

facts of the case. One of those admitted facts was that the respondents, when accepting a deposit of the scrip then in question, did not know that the appellants had any claim upon it, and there does not appear to have been any ground for contending that there was notice as distinguished from knowledge. The argument founded on novelty would not, in any event, be entitled to much weight, seeing that we are dealing with a practice which, if not of recent origin, may be taken to have grown into importance of late years, and seeing also that what is practically the same practice has already been examined and condemned in the case of the *Earl of Sheffield* v. *London Joint Stock Bank* (1). In my judgment, therefore, the Plaintiff is entitled to succeed against the Defendants, and to obtain relief on the footing of their having realized his bonds, without authority, for their own use.

H. L. F.

It was arranged that the question as to the measure of damages to which the Plaintiff was entitled, having regard to the fluctuations in the price of the bonds, should be argued in the case of

LITTLE *v.* LONDON JOINT STOCK BANK,

in which the facts were substantially the same as in *Simmons* v. *London Joint Stock Bank.*

C. A.

March 17, 18. *Warmington*, Q.C., and *Grosvenor Woods*, for the Plaintiff:—

The measure of the Defendants' liability is the highest price at which the securities could have been sold by the Plaintiff between the 14th of June, 1887 and the 13th of March, 1889, but for the claim of the Defendants, with interest at 4 per cent.: *Cockburn* v. *Edwards* (2); *Williams* v. *Peel River Land and Mineral Company* (3).

Sir *H. Davey*, Q.C., *Finlay*, Q.C., and *W. D. Rawlins*, for the Defendants:—

The proper measure of damages is the price realized at the

(1) 13 App. Cas. 333. (2) 16 Ch. D. 393.
(3) 55 L. T. (N.S.) 689.

C. A. 1890

SIMMONS v. LONDON JOINT STOCK BANK.

LITTLE v. LONDON JOINT STOCK BANK.

time of sale, with interest at 4 per cent.: *In re Bahia and San Francisco Railway Company* (1).

KEKEWICH, J. :—

I have looked into the cases cited by Mr. *Grosvenor Woods*, and I do not think that I need hear Sir *Horace Davey* upon the main question. I do not propose to give any judgment other than a formal judgment in *Little* v. *London Joint Stock Bank*, because I understand the facts to be practically the same as those in *Simmons* v. *London Joint Stock Bank*; and, as Sir *Horace Davey* has said, that being so, he cannot argue the questions of law. The only point, therefore, upon which I have to say anything is as to the measure of damages—a point which arises under somewhat different circumstances in the two cases. In *Simmons'* case the bank realized all the securities in question immediately after *Delmar's* failure. In *Little's* case they realized some, but not others. It is contended on behalf of the Plaintiffs that in both cases this rule is to apply; that the bank are to be responsible not only for the securities which they can give up, or for the value of the securities realized by them, but also for such a sum as represents the difference between the present value of the first, or the realized value of the second, and the highest price which has been attained, according to the market quotations, since the date when the bank claimed these securities as their own. In support of that Mr. *Grosvenor Woods* referred to the case of *Williams* v. *Peel River Land and Mineral Company* (2). The only ground upon which the claim is rested is that the Plaintiff, say, Mr. *Little* (as it was principally upon that case it was argued), did not purchase the securities as a permanent investment, but with a view to realization, and that, therefore, it must be presumed that when the bonds reached their highest price in the market he would have immediately realized at that price, and, therefore, is to be entitled now to have what he would have realized had that presumed sale been made. To my mind, that is very far from the legitimate conclusion. The very fact that a man intended to speculate—that is to say, not to buy for the purpose of investment, but with the view of selling again if he could

(1) Law Rep. 3 Q. B. 584. (2) 55 L. T. (N.S.) 689.

do so at a profit—introduces an element of chance or uncertainty into the problem. As I pointed out to Mr. *Warmington* yesterday, it is quite uncertain whether Mr. *Little* would have realized before it reached the highest price, or whether he would have been advised, or have thought, that the bonds would have gone higher. But I need not pursue that matter further, because in the very case which is cited by Mr. *Grosvenor Woods* the matter is dealt with, in language which is far better than any I could use, by Lord Justice *Bowen*. He says (1): "Would the owner of the stock have sold his stock during the period which intervened between the refusal to give it up and the trial? Now, the market rose during a portion of the time, and the market fell during the latter part. Would the owner of the stock have sold?" I need not read any more; but those questions were present to the Court of Appeal, and they saw the element of chance, and did not give the plaintiff there the relief which is claimed here on behalf of Mr. *Little*. It seems to me that, according to any principle on which damages ought to be ascertained, all element of chance must be excluded from the calculation. There are many other passages in that report, the whole of which is worthy of study, with reference to a case of this kind, which, I think, support the same view, or, at any rate, do not support the view put forward by Mr. *Grosvenor Woods*. But, apart from that, there are several cases going to the same conclusion. There is the case to which Sir *Horace Davey* shortly called my attention yesterday—*In re Bahia and San Francisco Railway Company* (2)—in which there are several passages of that kind. Lord Chief Justice *Cockburn* (3) says: "The measure of damages would be the market price of the shares at that time; if no market price at that time, then a jury would have to say what was a reasonable compensation for the loss of the shares." The case on which my decision on the main point has much turned is the case of *Earl of Sheffield* v. *London Joint Stock Bank* (4), which entirely supports the same view. The formal judgment of the House of Lords is set out at the end of the report, and that is in accordance with what the Lord Chancellor says in moving the

(1) 55 L. T. (N.S.) 693.
(2) Law Rep. 3 Q. B. 584.
(3) Law Rep. 3 Q. B. 595.
(4) 13 App. Cas. 333.

C. A. 1890 SIMMONS v. LONDON JOINT STOCK BANK. LITTLE v. LONDON JOINT STOCK BANK. Kekewich, J.

House. He says: "I move your Lordships that the judgment of the Court of Appeal and that of Mr. Justice *Pearson* be reversed, and that the plaintiff is entitled to the declaration he asks, and the redemption of such bonds and securities as remain unsold, and an inquiry as to the value of the stocks and bonds sold, such value to be ascertained as at the time when the plaintiff demanded their redemption upon his tendering the amount of the debt and interest due upon them." No doubt the immediate application of that case is made a little more difficult by the peculiar circumstances and element of redemption which is there referred to; but the principle seems to be the same, and that principle is recognised in many other cases cited, and precisely put in the judgment of the Master of the Rolls in *In re London, Tilbury and Southend Railway Company and Gower's Walk Schools* (1): "On this point the rule seems to me to be that where a plaintiff has a cause of action for a wrongful act of the defendant the plaintiff is entitled to recover for all the damage caused which was the direct consequence of the wrongful act and so probable a consequence that, if the defendant had considered the matter, he must have foreseen that the whole damage would result from that act." It appears to me that what is contended for on behalf of the Plaintiff is so probable a consequence that I can understand the bank to have foreseen it. Frequently that is a difficult principle to apply, because when you speak of the consequences foreseen from the breach of the contract, as often as not, and probably more often than not, no consequences are foreseen or contemplated. But here one can well understand the bank saying, "We had better realize; for if we realize and we are found after all to be in the wrong, we shall know what we have to pay for it, or what damages we shall have to pay." One may fairly put oneself in the position of the bank and of the Plaintiff; and at any rate the bank never could have contemplated that these bonds would go up to any higher price, or even contemplated a price at all. They certainly could not fix a price which would be the maximum price during that particular period. Therefore, that altogether breaks down on principle and on authority. I cannot allow that claim. As regards the securities

(1) 24 Q. B. D. 326, 329.

which the bank have not realized, which are all in *Little's* case, they must, of course, hand over those securities. That will follow from my judgment, and equally, of course, they must account for any interest or dividends received by them on what I have held to be the Plaintiff's securities and not theirs. Then, they must also account for any difference in the value of the securities on the 14th of June, 1887, and the present time—that is to say, if they are giving over securities of less value than they received. As regards what they realized, either in *Little's* case or *Simmons'* case, they will, according to my judgment, be accountable for the sums which they received, and interest at 4 per cent. upon those sums until payment.

H. L. F.

From both of these judgments the Defendants appealed.

SIMMONS *v.* LONDON JOINT STOCK BANK.

This appeal was heard on the 18th of November, 1890.

C. A.

Sir *Horace Davey*, Q.C., *Finlay*, Q.C., and *W. D. Rawlins*, for the Appellants:—

We contend, in the first place, that the bonds which were deposited by *Delmar* in the Defendants' bank were not the property of the Plaintiff. The bonds which he had entrusted to *Delmar* had been sold, and *Delmar* had purchased fresh bonds. He must look to *Delmar's* estate to make them good; he has no remedy against the Defendants. The new bonds were never appropriated by *Delmar* to the Plaintiff in substitution for his bonds. If the numbers of the bonds were altered in the books of the firm, that was done without the Plaintiff's authority or knowledge. In fact, when *Delmar* deposited them with the Defendants, *Delmar* had no power to appropriate them to the Plaintiff, for he had not paid for them, and they were not his property, the cheque which he gave in payment for them not having been then cashed. Payment by cheque is only a conditional payment, and until the cheque is cashed the property does not pass to the purchaser: *Loughnan* v. *Barry* (1); *Benjamin* on Sales (2); *Bishop* v. *Shillito* (3).

(1) I. R. 6 C. L. 457. (2) 4th Ed. pp. 282, 304. (3) 2 B. & Al. 329, n.

C. A.
1890
SIMMONS v. LONDON JOINT STOCK BANK.
LITTLE v. LONDON JOINT STOCK BANK.

But if the bonds had been appropriated to the Plaintiff when they were deposited, we contend that the bank had acquired a good title as *bonâ fide* holder for value. It was admitted in the course of the argument in the Court below that the bonds were negotiable instruments.

[*Rigby*, Q.C.:—It was admitted that the bonds passed from hand to hand on the English *Stock Exchange*, but not that they were negotiable instruments in the legal sense of the term.]

If they are negotiable instruments in *America*, the country in which they were issued, and if the property passes in this country by delivering from hand to hand, it follows that they are of the nature of negotiable instruments here: *Goodwin* v. *Robarts* (1). But as the main point occurs in *Little* v. *London Joint Stock Bank*, we will not press it further now. But supposing the bonds are not negotiable securities in the legal sense, we say that it was the constant habit of brokers to advance money to their customers on deposit of these securities, and to obtain the money which they advance by depositing the same securities with a banker. They have a perfect right to do so; and the bankers are under no obligation to inquire whether they have any authority to pledge the securities which they offer. And if the broker pledges the securities of several of his customers *en bloc*, the bankers are not affected with notice unless they have some special reason for suspicion. They are not to suppose that the broker is committing a fraud, and are not called on to inquire into the extent of his authority.

Rigby, Q.C., *Warmington*, Q.C., and *Grosvenor Woods*, for the Plaintiff:—

The new bonds were appropriated to the Plaintiff in substitution for the old ones which had been fraudulently sold. This appropriation took place, directly *Delmar* bought them, on the 12th of October. He then obtained an absolute property in them, not a mere conditional property, depending on the cashing of the cheque. If the cheque had been dishonoured, *Delmar* would not have lost the bonds; he would have found some other

(1) 1 App. Cas. 476.

means of paying for them. The Plaintiff, therefore, claims to be the owner of the bonds, and nothing has been done to displace his title. He gave *Delmar* no authority to part with them or deposit them. He dealt with them as a broker who bought and sold for other persons, and lent money to them on deposit of securities; but he gave him no authority, express or implied, to pledge his securities for his own debts. *Delmar* dealt with the bonds in an entirely different manner from that in which he was authorized to deal with them.

Then, on the second point, we maintain that the *Cedula* bonds were not negotiable securities in the sense of their giving a good title like bills of exchange, independently of the equities attaching to them. We admit that the property passed in them; but the bankers took them subject to the equitable rights of the Plaintiff: *Crouch* v. *Credit Foncier of England* (1). But whether the bonds were negotiable securities or not, *Earl of Sheffield* v. *London Joint Stock Bank* (2) governs this case. Here, as in that case, the bankers knew that there was some one behind the broker who deposited the bonds; they knew that they were not his bonds, but that he purported to be acting under the authority of his customers, and they were bound to inquire as to the extent of that authority: *Colonial Bank* v. *Cady* (3); *Cooke* v. *Eshelby* (4).

Finlay, in reply, referred to *Foster* v. *Pearson* (5); *Haynes* v. *Foster* (6); *Wookey* v. *Pole* (7).

LITTLE *v.* LONDON JOINT STOCK BANK.

C. A.

This appeal was heard on the 21st of November, 1890.

Finlay, Q.C., and *W. D. Rawlins*, for the bank:—

We contend that where, either by the constitution of a foreign company or by the law of *England*, mercantile documents pass by mere delivery, they are negotiable in the full sense of the

(1) Law Rep. 8 Q. B. 374.
(2) 13 App. Cas. 333.
(3) 15 App. Cas. 267.
(4) 12 App. Cas. 271.
(5) 1 C. M. & R. 849.
(6) 2 C. & M. 237.
(7) 4 B. & Al. 1.

C. A. 1890 SIMMONS v. LONDON JOINT STOCK BANK. LITTLE v. LONDON JOINT STOCK BANK.

word; so that a *bonâ fide* holder for value is not affected by any infirmity in the title of the person from whom he receives them. The cases on the subject are collected under *Miller* v. *Race* (1), in *Smith's* Leading Cases (2), *Solomons* v. *Bank of England* (3), and *Gorgier* v. *Mieville* (4), where a bond of the King of *Prussia* was held negotiable, are leading cases on the subject. As to the expressions in *Smith's* Leading Cases (5), light is thrown upon them by the language in p. 505, and *Lang* v. *Smythe* (6), there referred to. *Crouch* v. *Credit Foncier of England* (7) explains the law on the subject. Proof of general usage, though not ancient, that an instrument shall be treated as negotiable, will suffice; but as regards the foreign securities, we are not driven to rely on that. *Goodwin* v. *Robarts* (8) is in our favour. The special case is given (9).

[BOWEN, L.J., referred to the observations of Lord *Selborne* in that case.

LINDLEY, L.J., referred to *Rumball* v. *Metropolitan Bank* (10).]

Rumball's Case is said in *Smith's* Leading Cases to have been overruled by the Exchequer Chamber in *Goodwin* v. *Robarts*; but it may be supported on the ground of estoppel. We say, then, that here all the documents are negotiable—the *Rio Tinto* shares under the terms of 30 & 31 Vict. c. 131, s. 27, and the rest under usage which shews the law of the foreign countries in which they are issued. The *Rio Tinto* shares and the second set of *Uruguay* bonds could not have been paid for but for our advances. We, therefore, have a title preferable to that of the Plaintiff.

Rigby, Q.C., and *Grosvenor Woods*, for the Plaintiff:—

It is urged that the bank's money must be taken to have gone into the Plaintiff's shares and bonds, for that the transactions would not have been completed but for the bank's advances. *Non constat* that they would not, for the bank was secured; and

(1) 1 Burr. 452.
(2) 9th Ed. vol. i. p. 491.
(3) 13 East, 135, n.
(4) 3 B. & C. 45.
(5) 9th Ed. vol. i. p. 504.
(6) 7 Bing. 284.
(7) Law Rep. 8 Q. B. 374.
(8) 1 App. Cas. 476.
(9) 44 L. J. (Ex.) 57.
(10) 2 Q. B. D. 194.

if the bank lent money to *Delmar* they cannot follow it into what he bought with it. We say that these were not negotiable securities in the full sense of that word. In no case except *Rumball* v. *Metropolitan Bank* (1), which we submit cannot be sustained, has it ever been held that anything which is not a security for money can be a negotiable instrument. The rule as to negotiable instruments was introduced because they are in their nature part of the currency of the realm. We do not admit that any of the documents in this case are in the proper sense negotiable; but suppose they were, the bank are not *bonâ fide* holders for value. Nobody on behalf of the bank alleges that they believed the documents which *Delmar* deposited with them to be his own. They were quite aware that he was dealing with the securities of his customers. They thought that there was a custom giving him authority to deal with them as he did; but in that they were mistaken, and must bear the consequences of their mistake. Believing that the securities were not *Delmar's* own, they were bound at their own peril to ascertain that he had authority to deal with them. *Foster* v. *Pearson* (2), which was cited in *Earl of Sheffield* v. *London Joint Stock Bank* (3), is quite different. There a custom was proved; here we have nothing more than evidence of a common practice of brokers to pledge their clients' securities *en bloc*, which falls far short of proving a custom.

Finlay, in reply.

SIMMONS *v.* LONDON JOINT STOCK BANK.

1890. Dec. 16. The judgment of the Court (*Lindley*, *Bowen*, and *Fry*, L.JJ.) was delivered by C. A.

BOWEN, L.J.:—

The Plaintiff was a customer of *Herapath, Delmar & Co.*, stock-brokers, and the action is brought against the Defendants, who were *Herapath, Delmar & Co.'s* bankers, to recover the value of certain *Argentine* bonds of the *Bank of Buenos Ayres*, to the value

(1) 2 Q. B. D. 194. (2) 1 C. M. & R. 849.
(3) 13 App. Cas. 333.

C. A. 1890

SIMMONS v. LONDON JOINT STOCK BANK.

LITTLE v. LONDON JOINT STOCK BANK.

of $15,000. The bonds were securities to bearer, issued with a Government guarantee, and circulated on the European markets. The Plaintiff had left in the hands of *Delmar*, one of the members of *Herapath, Delmar & Co.*, for custody *Argentine* bonds to the above amount; but on the 12th of October, 1887, *Delmar*, desiring to raise money for purposes of his own, and without any authority from the Plaintiff, contracted to sell the Plaintiff's said bonds to Messrs. *Prior & Co.* for the sum of £1820, and on the same day made a further contract to repurchase similar bonds to the value of $15,000 for the 28th. On the 28th of October *Delmar* gave delivery of the bonds he had contracted to sell in three separate lots, and on the same day took delivery from a firm named *Greenwell & Co.* of the similar but different bonds which he had contracted to buy. *Delmar's* account with the Defendants was overdrawn. For the bonds so delivered to him he paid by a crossed cheque; and in order to put himself in funds to meet it he sent the bonds of which he had taken delivery, with other securities, to the Defendant bank, on receipt of which the Defendants placed £6000 to his credit. Out of this sum *Delmar's* cheque was cashed when it arrived through the clearing-house at the Defendants' bank. The bonds so deposited remained in the custody of the bank till *Delmar* failed and left the country in June, 1888. Thereupon the Plaintiff, on the 14th of June, applied to the bank for the bonds, which, however, had been sold, with the rest of *Delmar's* securities, for a price that is admitted to have been fair. The counsel for the Defendants, who are the Appellants, contended, in the first place, before us that the bonds deposited on the 28th with the Defendants were *Delmar's* bonds, and not the Plaintiff's, and that the Plaintiff was not entitled to complain of their being sold by the Defendants against *Delmar's* debt. It is true that they were not the original bonds left by the Plaintiff in *Delmar's* hands. It becomes necessary, therefore, to consider whether they had become the Plaintiff's by substitution and appropriation before being pledged by *Delmar* to the bank. The contention on the part of the Appellants was that the property in the newly-purchased bonds did not vest in *Delmar* till his cheque was cashed, and that, even if it did, there was no complete appropriation of

the bonds by *Delmar* to the Plaintiff until he had raised the money to pay for them by pledging them to the bank. We are of opinion that the property in the bonds passed to *Delmar* on the delivery of the bonds in exchange for *Delmar's* cheque. It is, of course, conceivable in law that by the terms of any particular contract the property in goods delivered may be reserved by the vendor until he sees whether the cheque received by him is honoured; but this is not the ordinary effect of a transaction in which goods are paid for by cheque, and we entertain no doubt that the property in the bonds passed to *Delmar* on their delivery. Then comes the inquiry, whether there was any appropriation by *Delmar* of the bonds to the Plaintiff, and when such appropriation, if any, took place. When *Delmar* parted in the first instance with the Plaintiff's original bonds, his real object was to raise money. The transaction was indeed effected by a sale of the Plaintiff's bonds and a repurchase of others, which he intended to substitute in their place; but *Delmar* only parted with the Plaintiff's bonds because he could not effect his object in any other way, and would be anxious to replace them by others as soon as possible. Before sending the newly-purchased bonds to the bank a correction was in fact made in *Herapath, Delmar & Co.'s* number-book, which earmarked the new bonds as the Plaintiff's; and, although it was attempted to be shewn that such entry was made without express authority on *Delmar's* part, we are of opinion that it was made in the course of his business by an agent who had implied authority to make it, and with a view to complete the transaction. We entertain no doubt, accordingly, that, before the bonds were deposited with the bank and before any lien of the bank could attach, the bonds had become, by substitution and appropriation, the property of the Plaintiff.

This leads us to the next contention on the part of the Appellants, viz., that the bonds were negotiable securities, and that, the bank having taken them for value and in good faith, without notice that they belonged to *Delmar's* principal, are entitled to hold them against all the world. Whether the bonds in question were negotiable securities in any sense in which such a commercial doctrine could apply was a matter left unproved.

C. A.
1890
SIMMONS
v.
LONDON
JOINT STOCK
BANK.
LITTLE
v.
LONDON
JOINT STOCK
BANK.

A negotiable instrument payable to bearer is one which, by the custom of trade, passes from hand to hand by delivery, and the holder of which for the time being, if he is a *bonâ fide* holder for value without notice, has a good title, notwithstanding any defect of title in the person from whom he took it. A contractual document in other words may be such that, by virtue of its delivery, all the rights of the transferor are transferred to and can be enforced by the transferee against the original contracting party, but it may yet fall short of being a completely negotiable instrument, because the transferee acquires by mere delivery no better title than his transferor. An admission was made at the trial to the effect that these bonds were commonly transferred from hand to hand by delivery, and this must be taken to be true. But the admission was carefully limited, and still left uncovered the question whether they are negotiable instruments in the sense in which bills of exchange and promissory notes are negotiable, so that delivery by a person who has no title confers, nevertheless, a title on a *bonâ fide* holder for value without notice. We should require either a more unqualified admission or else more conclusive evidence before we could accept the view that bonds like these had become part of the currency of this country so as to have acquired the peculiar characteristics of a completely negotiable instrument. The Appellants' counsel alleged that they had been misled at the trial by the form of the admission, and asked that, before we decided the case on the hypothesis that these bonds were not completely negotiable, an issue might be directed to try that question. For fear of a miscarriage of justice we will, therefore, assume in the Appellants' favour, and for the purpose of this case only, that the documents in question had been proved to be completely negotiable instruments, and we proceed to inquire, on that assumption, whether the bank, even if this were so, ever became *bonâ fide* holders of them for value, without notice of the infirmity of the title of *Delmar*. The inferences of fact which we draw, partly from the admissions of the bank's officers and partly from the absence of testimony on their part which might have been given, if the fact had been otherwise, are as follows. The bank, we think, were aware that the bonds might

very probably belong not to *Delmar* at all, but to one or more of his clients. The bank took it for granted that, if the bonds did not in fact belong to *Delmar*, he had been authorized by the real owner to raise money on the bonds, within the limit of their market value. This assumption and belief were based, not on inquiry or investigation, but on the bank's faith in the honesty of *Delmar*, and was, in fact, erroneous. But the bank did not believe that *Delmar* had been authorized by the real owner to deposit the bonds *en bloc*, together with other securities, which belonged to other persons, and to raise a lump sum upon the whole. The bank were indeed honestly of opinion that *Delmar* might lawfully do so; but we think that they based this view upon a mistaken assumption that such deposit *en bloc*, without authority from the client, was recognised by the law. In other words, they knew that the bonds in question might probably belong to a third person; they did not know and did not believe that the owner had authorized their being deposited and pledged *en bloc*, but they honestly believed that such an authority from the owner was not necessary in law, if he had sanctioned (as the bank assumed from their faith in *Delmar's* honesty to be the case) the pledging of the documents for any sum of money whatsoever. If this be the true view of the transaction, the bank never became *bonâ fide* holders for value without notice, since they never believed that *Delmar* was the true owner, and never, indeed, believed that any authority had been given by the true owner, which alone in law could justify what was being done. On the contrary, they chose to shut their eyes to this necessary part of the inquiry under a misconception of the law. The case of *Earl of Sheffield* v. *London Joint Stock Bank* (1) seems to shew that, under such circumstances, the bank acquired no title to the bonds as against the true owner. The appeal, therefore, in the case of *Simmons* v. *London Joint Stock Bank*, must be dismissed with costs.

LITTLE *v.* LONDON JOINT STOCK BANK.

We come next to the case of *Little* v. *London Joint Stock Bank*. In this action the Plaintiff *Little* claims to be entitled to relief

(1) 13 App. Cas. 333.

C. A. 1890

SIMMONS v. LONDON JOINT STOCK BANK.

LITTLE v. LONDON JOINT STOCK BANK.

against the bank in respect of various securities, which may be classified as follows: Certificates for shares of £20 each, with £10 paid thereon, in the *Imperial Ottoman Bank*; share warrants for shares in the *Rio Tinto Mining Company, Limited*; bonds of the *Uruguay* Five per Cent. Unified Loan of 1883. We are ready, as in the previous appeal, to assume, for the purposes of the argument, and in the Defendants' favour, that all these securities were impliedly negotiable, although it is difficult to see how shares, share warrants, or certificates of shares in a company, which are not securities for money, can be entitled to that description, and although without further evidence or further admission than was given at the trial, we should question much whether any of the securities in question, at all events other than the *Uruguay* Government bonds, were completely negotiable instruments within the known commercial and legal definition of that term. We assume, however, for the purposes of the case that they all were negotiable instruments. All of these securities were deposited by *Delmar* with the Defendants for objects and under circumstances similar to those under which the bonds of Mr. *Simmons* in the previous action were deposited. It follows, therefore, that the rights of the parties in respect of them will be governed by our previous decision in *Simmons* v. *London Joint Stock Bank*, unless, on examination of the facts in the present action, it should appear that in the case of any of the securities there was no appropriation by *Delmar* to the Plaintiff prior to the deposit with the bank.

We proceed, therefore, to examine the question whether there was in fact such an appropriation in respect of all or any of these securities. (1.) As to the certificates for shares in the *Ottoman Imperial Bank*, it was not disputed before us that there had been the necessary appropriation. (2.) As to the share warrants for the *Rio Tinto* shares, on the 9th of April, 1887, *Delmar*, on the Plaintiff's instructions, bought for him from Messrs. *Prior & Williams* 100 *Rio Tinto* shares, of which the seventy-five claimed in this action formed a portion. When the time for delivery arrived *Delmar* received, through the *Stock Exchange* Clearing House, not the identical shares which he had purchased from *Prior & Williams*, but an equal number of similar shares from Messrs.

Gregg & Argenti. These were received, however, by *Delmar* in substitution for the actual shares which were the subject of the contract with *Prior & Williams*, and were appropriated to the Plaintiff by number in *Herapath, Delmar & Co.'s* number-book. They became thereupon, in my opinion, to all intents and purposes, the Plaintiff's shares. (3.) The *Uruguay* Five per Cent. Unified Loan bonds. These bonds were divided in the argument before us into two lots—the first consisting of bonds to the value of £1500; the second of bonds to the value of £2000. As to lot 1, no dispute as to the appropriation was raised before us by the Defendants. As to lot 2, the circumstances of their purchase were in substance similar to those narrated already in reference to the *Rio Tinto* shares, and the appropriation to the Plaintiff was effected in the same manner. The result is that, with regard to all the securities in respect of which the Plaintiff *Little* claims, the appropriation to him was complete before deposit with the bank, and *Little's* action comes accordingly within our decision in the case of *Simmons*. The appeal in *Little's* case must also, therefore, be dismissed with costs.

Solicitors: *R. S. Gregson; Clarke, Rawlins & Co.*

M. W.
H. C. J.

NORTH, J.
1890
Nov. 20.

In re SCOTT.
SCOTT *v.* HANBURY.

[1889 S. 4817.]

Infant—Settlement—Exercise of general Power of Appointment—Failure of Limitations—Resulting Trust—Death of Infant under Twenty-one—Infants Settlement Act, 1855 (18 & 19 *Vict. c.* 43), *ss.* 1, 2 [*Revised Ed. Statutes, vol. xii., p.* 468].

Sect. 1 of the *Infants Settlement Act* enables an infant, in exercising a general power of appointment for the purpose of making a settlement upon his marriage, to make an absolute out-and-out appointment, so that, on the failure of the limitations of the settlement, the appointed property will become his own.

In the event of the death of an infant under twenty-one, after making an appointment under sect. 1, sect. 2 of the Act does not render the appointment void, except in the case of an infant tenant in tail.

A mother, who had an illegitimate daughter, by her will gave the residue of her real and personal estate to trustees, upon trust for conversion, and during the life of the daughter to pay the income thereof to her for her separate use, without power of anticipation; and, from and after her death in trust as she should by will appoint, and in default of appointment in trust for the children of the daughter. After the death of the mother the daughter, who was still an infant, married. Prior to her marriage she, with the sanction of the Court under the *Infants Settlement Act,* executed a settlement, by which, in exercise of the power given to her by the will, she appointed that her mother's residuary estate should, from and after the solemnization of the intended marriage, become vested in the trustees of the settlement (who were not the same persons as the trustees of the will), upon trust to pay the income of the fund to the wife during the joint lives of herself and the husband, for her separate use, without power of anticipation; with remainder to the survivor for his or her life; and, from and after the death of the survivor, the trustees were to hold the trust fund in trust for the children of the marriage as therein mentioned, and in default of children in trust for such person or persons as the wife should, as therein mentioned, appoint; and in default of such appointment, if the wife should survive the husband, in trust for her absolutely; but, if she should not survive him, in trust for such person or persons as under the *Statutes of Distribution* would have become entitled thereto at the death of the wife, had she died possessed thereof intestate and without having been married.

The wife died before the husband, and while still an infant. There was no issue of the marriage, and she had not exercised the general power of appointment reserved to her by the settlement:—

Held, that by the appointment under the power given to her by the

mother's will, the wife had, subject to the limitations of the settlement, made the property her own; that on failure of those limitations there was a resulting trust for her; and that the husband was entitled to the fund as her administrator.

ORIGINATING SUMMONS by *J. R. Scott* asking for a declaration that he in his own right, and as the legal personal representative of *Edwina Lizzie Scott*, deceased, his late wife, was entitled to certain trust funds over which she, under the will of her mother, *Eliza Maurice*, had a power of appointment, which power was exercised by a settlement made on the marriage of himself and his late wife.

Edwina Lizzie Maurice was the illegitimate daughter of *Eliza Maurice*. *Eliza Maurice*, by her will, dated the 15th of May, 1880, devised and bequeathed her residuary real and personal estate to *Edward Hall* and *Wm. Harwood* (whom she also appointed executors), upon trust for sale and conversion and investment of the proceeds as therein mentioned, and to set apart and appropriate a fund sufficient to pay and satisfy certain annuities bequeathed by the will, and to stand possessed of the residue, and also of the fund set apart to answer the annuities, subject to those annuities, upon trust, during the life of her daughter, to pay the income thereof to her, for her separate use without power of anticipation; and, from and after her decease, in trust for such person or persons and in such manner as the daughter should from time to time (whether covert or sole) by deed or will appoint; and, in default of appointment, in trust for the children of the daughter as therein mentioned. The testatrix died on the 23rd of July, 1888. On the 1st of December, 1888, the daughter married *J. R. Scott*. She was then an infant under the age of twenty-one. On the 7th of November, 1888, a settlement was made of her property in contemplation of the marriage. The settlement was made with the sanction of the Court under the provisions of the *Infants Settlement Act* (18 & 19 Vict. c. 43). By this deed the infant, by virtue of the power given to her by the will of her mother, appointed that the residuary estate of the mother should, from and after the solemnization of the then intended marriage, go unto and become vested in the trustees of the settlement, upon the trusts therein declared concerning the same. The trusts

NORTH, J. 1890 *In re* SCOTT. SCOTT v. HANBURY.

declared were—to pay the income of the fund to the wife during the joint lives of herself and the husband, for her separate use without power of anticipation; and, from and after the death of either of them, to pay the income to the survivor of them for her or his life; and, from and after the death of the survivor of the husband and wife, the trustees were to hold the trust fund in trust for the children of the marriage, as the husband and wife should by deed jointly appoint, and, in default of such appointment, as the survivor should appoint; and, in default of such appointment, in trust for the children of the marriage at twenty-one or marriage, in equal shares. In default of any person to take the trust fund under the previous trusts, the trustees were to hold the fund in trust for such person or persons as the wife should during coverture by will, or when not under coverture by deed or will, appoint; and, in default of such appointment, if the wife should survive the husband, in trust for her absolutely; but, if she should not survive him, then in trust for such person or persons as under the Statutes for the distribution of intestates' effects would have become entitled thereto at the death of the wife, had she died possessed thereof intestate and without having been married, such persons, if more than one, to take as tenants in common, in the shares in which they would have taken under the same statutes.

The wife died on the 22nd of April, 1889, being still an infant, and intestate. There was no issue of the marriage. She had not exercised the power of appointment given to her by the settlement. On the 19th of June, 1889, the husband took out administration to her estate.

The question was, who was entitled to the trust fund—the husband, or the next of kin of the wife's mother.

The Defendants to the summons were: the trustees of the settlement; the executors of the mother; and three of the next of kin of the mother.

Vernon R. Smith, for the husband:—

The husband is entitled to the fund. The wife being illegitimate, the ultimate trusts declared by the settlement could not take effect, and, subject to the life interest of the husband, there

is a resulting trust in favour of the wife, and the husband takes her interest as her administrator. By virtue of the appointment made by the settlement, the fund has ceased to be subject to the will of the mother: *In re Van Hagan* (1); *In re D'Angibau* (2). Sect. 2 (3) of the *Infants Settlement Act* does not make a settlement executed by an infant void in the event of his death during infancy, except in the case of an infant tenant in tail.

P. B. Lambert, for the executors of the mother, and for two of her next of kin who desired that the fund should go to the husband:—

The settlement is in effect an appointment of the fund by the wife to herself, and then a settlement by her. The question is one, not of intention, but of resulting trust: *Sugden* on Powers (4).

Upjohn, for another of the next of kin of the mother:—

(1.) By reason of the death of the wife under twenty-one, the settlement made by her under the statutory power failed of effect. The language of sect. 2 is no doubt obscure; but it could not have been intended that a settlement made under the Act should become void, in the event of the death of the settlor under twenty-one, only in the case of an infant tenant in tail.

(1) 16 Ch. D. 18.

(2) 15 Ch. D. 228.

(3) By sect. 1: "From and after the passing of this Act it shall be lawful for every infant upon or in contemplation of his or her marriage, with the sanction of the Court of Chancery, to make a valid and binding settlement or contract for a settlement of all or any part of his or her property, or property over which he or she has any power of appointment, whether real or personal, and whether in possession, reversion, remainder, or expectancy; and every conveyance, appointment, and assignment of such real or personal estate, or contract to make a conveyance, appointment, or assignment thereof, executed by such infant, with the approbation of the said Court, for the purpose of giving effect to such settlement shall be as valid and effectual as if the person executing the same were of the full age of twenty-one years: Provided always, that this enactment shall not extend to powers of which it is expressly declared that they shall not be exercised by an infant."

By sect. 2: "Provided always, that in case any appointment under a power of appointment, or any disentailing assurance shall have been executed by any infant tenant in tail under the provisions of this Act, and such infant shall afterwards die under age, such appointment or disentailing assurance shall thereupon become absolutely void."

(4) 8th Ed. p. 467.

NORTH, J. 1890 *In re* SCOTT. SCOTT *v.* HANBURY.

There can be no reason for such a distinction, and sect. 2 ought to be read as if it had said, "executed by any infant or infant tenant in tail," or as if the words "tenant in tail" had been omitted.

(2.) At any rate, the intention was, that the appointment should take effect only for the purposes of the limitations of the settlement, not to make the property that of the infant for all purposes. Subject to the limitations of the settlement, the property remained subject to the will of the mother. In the cases cited the whole beneficial interest was disposed of by the appointment. In the present case the limitations to the next of kin of the wife could not, as she was illegitimate, have taken effect unless she had married. The Act does not put an infant in the same position as if he were of age; it only enables him to exercise a power of appointment for the purposes of a settlement. In *In re Van Hagan*, Sir *G. Jessel*, M.R., quoted (1) with approval the rule laid down in *In re De Lusi's Trusts* (2), that the question is one of intention. In the present case the Court will not imply an intention on the part of the infant to exercise the power to any greater extent than was necessary in order to give effect to the limitations of the settlement. It is not necessary to shew an absolute intention that the fund should go back on failure of the trusts declared by the settlement. The *onus* is on the husband to shew an intention to take the fund out of the will for all purposes. In considering the question of intention, the fact that the power was created by statute must be regarded. The settlement is not of itself evidence of an intention to do more than was required to effect its purposes.

Theobald, for the trustees of the settlement.

NORTH, J.:—

In my opinion, the case is quite clear. The first point relied on by Mr. *Upjohn* is sect. 2 of the *Infants Settlement Act*, and it is said that, by reason of the wife having died while she was still under twenty-one, sect. 2 invalidates the settlement which she made under the power conferred on her by sect. 1. I do not think sect. 2 has that effect. It may be that it would invalidate

(1) 16 Ch. D. 29. (2) 3 L. R. Ir. 232.

any settlement executed by an infant tenant in tail, if he died before he had attained twenty-one. But here the settlor was not a tenant in tail; and what I am really asked to do is, to alter the language of sect. 2, either by striking out the words "tenant in tail," or by inserting before them the words "infant or," so that every infant may be included in the section. I do not feel myself at liberty to alter the language in this way. I think that the Act means what it says, and that sect. 2 does not apply to an infant who is not a tenant in tail.

Then, as to the second point taken by Mr. *Upjohn*, this lady had, under the will of her mother, an absolute power of appointment (subject to her own life interest) over the residue of her mother's estate, which she exercised by appointing the fund to the trustees of the settlement made upon her marriage. Those trustees were not the same persons as the trustees of the will which created the power. [His Lordship read the trusts declared by the settlement, and continued:—]

A more complete and exhaustive disposition on the face of the instrument itself one could not well expect to find. But it is said that the lady, being in fact illegitimate, could have no next of kin to take under the ultimate limitation, in case she died before her husband and without issue. That is quite true; and probably neither the lady herself, nor her legal advisers, nor the Court, knew anything about her illegitimacy. But, even if they did know of it, I do not think it would make any difference. It is well settled that, when an absolute appointment by will fails, by reason of the appointee dying before the appointor, the Court still sees an intention on the part of the appointor to appoint the fund absolutely and to make it his own, notwithstanding the failure of the person to whom the beneficial interest is given. I can find no limitation in sect. 1 of the Act of the power given to the infant, so as to restrict it to the making a settlement upon the wife, or the husband, or the children of the marriage. The power conferred by sect. 1 is an absolute one, and it clearly enables the infant to make an appointment which will take effect, on the failure of the limitations of the settlement, in favour of the infant himself. So far as the Act goes, there is, in my opinion, clearly power for the infant to do this. But it is

NORTH, J. 1890 *In re* SCOTT. SCOTT *v.* HANBURY.

said that the question is one of intention. As to that, I need only read the following observations of Sir *G. Jessel*, M.R., in *In re Van Hagan* (1). He said: "Then the only question remaining is, what is to become of the property in case the intention that the beneficial legatee or devisee shall take cannot have effect. That is a mere question of resulting trust. Resulting trust for whom? As already pointed out by Lord Justice *James*, when Vice-Chancellor, it must either be for the original settlor or for the appointor, and, considering that a general power is for almost all purposes equivalent to property, and is so dealt with by the Legislature in the *Wills Act* as regards testamentary appointments, the fair and proper result, in my opinion, is to treat the trust as resulting to the appointor, so as to carry the property to the person or persons who would take his real or personal estate, as the case may be, or, to put it in the words of Vice-Chancellor *Wickens*, in the case of *In re Davies' Trusts* (2), 'It seems settled by the cases of *Chamberlain* v. *Hutchinson* (3) and *Wilkinson* v. *Schneider* (4), authorities which are binding on me, that a testamentary appointment under a general power to *A.*, in trust for *B.*, which lapses as to the beneficial interest by *B.'s* death before the appointor, operates as a good appointment in favour of *A.*, who holds on the same trusts as if it had been the appointor's own property.' There is this also to be said, that the gift to trustees is rational, if the testator knew that it would make the property part of his assets and liable to the payment of his debts. But there does not seem to be any sufficient motive for interposing a trustee when the beneficiary takes absolutely in the case of real estate." The judgments of the Lords Justices *James* and *Cotton* were to the same effect. There is this further indication in the present case: I do not say it is very strong, but I think it has some weight: By the appointment the property is taken entirely away from the trustees of the mother's will, who, on the hypothesis suggested, would, one would think, have been the proper persons to have the distribution of the fund, if the appointment was not intended to be an absolute out-and-out one; whereas the appointment is clearly absolute as regards

(1) 16 Ch. D. 32.
(2) Law Rep. 13 Eq. 166.
(3) 22 Beav. 444.
(4) Law Rep. 9 Eq. 423.

the trustees of the settlement. That being so, and the beneficial limitations being clearly complete and absolute on the face of the settlement, I hold, following the reasoning of the Court of Appeal in *In re Van Hagan* (1), that the appointment was also absolute in the one possible contingency of all the limitations of the settlement failing to take effect.

Solicitors: *Pritchard & Sons; Harwood & Stephenson; C. A. Clulow.*

W. L. C.

In re WANZER, LIMITED.

Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 87, 163 [*Revised Ed. Statutes, vol. xiv., pp.* 222, 238]—*Scotch Urban Landlord's Hypothec—Sequestration.*

On motion by a liquidator in a winding-up to restrain a Scotch landlord of urban property from proceeding with sequestration to enforce his hypothec:—

Held, that the sequestration was void under sect. 163 of the *Companies Act*, 1862. But, the Court being of opinion, on the evidence as to Scotch law, that hypothec gives a security on the goods on the premises, leave was given, under sect. 87 of the *Companies Act*, 1862, to proceed with the sequestration unless sufficient security was given for the rent of the current year, including a period previous to the winding-up, on terms of the landlord paying the costs of the motion.

A SHOP, No. 34, *Gordon Street, Glasgow*, was let by the proprietors, the *Scottish Lands and Buildings Company*, a Scotch company, to *Wanzer, Limited*, an English company, for a term of years, from Whitsunday, 1890, at a yearly rent of £230, payable half-yearly, at Martinmas (11th November) and Whitsunday (15th May).

On a petition presented on the 14th of August, 1890, an order was made to wind up *Wanzer, Limited*, compulsorily, and Mr. *Cooper* was appointed provisional liquidator. He took possession of No. 34, *Gordon Street, Glasgow*, and took steps to remove the goods and stock there to *London*, informing the landlord's agent of his intention to remove the goods.

The *Scottish Lands and Buildings Company*, on the 16th of

(1) 16 Ch. D. 18.

NORTH, J.
1890
In re WANZER, LIMITED.

October, 1890, commenced proceedings in the Sheriff's Court of *Lanarkshire* to sequester the goods at the premises in *Glasgow*. The proceedings were commenced by petition. The *Scottish Lands and Buildings Company* and their general manager were Pursuers. *Wanzer, Limited*, were Defenders. The Petitioners prayed the Court to sequester the whole of the stock, furniture, and effects, which were or had been since Whitsunday, 1890, on the premises, and to grant warrant to the officer of the Court to inventory and secure the same in security, and for payment to the Pursuers of, first, the £115, being the half-year's rent to accrue due at Martinmas; second, the £115 to accrue due at Whitsunday, 1891, with interest and expenses; and to grant warrant to an auctioneer named to sell the whole, or so much of the sequestrated effects as should be sufficient to satisfy the demand; but so that no sale was to take place till the Martinmas rent, 1890, or the Whitsunday rent, 1891, had become due and remained unpaid; and to decern and ordain payment out of the proceeds of sale, or out of any sum consigned to get the sequestration cancelled; and to decern and ordain the Defenders to furnish stock and replenish the premises to afford sufficient security for payment of any deficiency, and, failing their doing so, within a short space of time to grant warrant to eject the Defenders.

The prayer was followed by a condescendence or statement of facts and pleas of law, setting forth the circumstances and legal grounds on which the Pursuers relied.

On an *ex parte* application, made on the 16th of October, 1890, the sheriff-substitute granted warrant to cite the Defenders, and meantime sequestered and granted warrant to the officer of the Court to inventory and secure as craved.

On the same day, the 16th of October, 1890, the sheriff's officer entered and took possession of the goods on the premises, and executed a formal document, expressed to "inventory and secure" the goods on the premises, which were specified, "all to remain in sure fence and sequestration at the instance of the said Pursuers, in security and for payment to them of the foresaid sums of rent, interest, and expenses as accords of law, with certification."

A motion was now made on the part of the liquidator against the Pursuers in the Scotch petition for a declaration that the proceedings were void to all intents, for an injunction to restrain their proceeding further with the sequestration, and for an order on them to deliver up the goods sequestered.

There were in evidence certain cases submitted to Professor *Rankine* and Mr. *Campbell*, advocates at the Scottish Bar, and to the Dean of Faculty (Mr. *Balfour*) with respect to the Scotch law on the landlord's right to security, and the effect of the 87th and 163rd sections of the *Companies Act*, 1862, thereon.

Napier Higgins, Q.C., and *C. E. E. Jenkins*, for the motion :—

The Scotch sequestration is within both the letter and the spirit of sect. 163 ; the word "sequestration" is found in company with the word "distress." The Act is applicable to *Scotland* no less than to *England*. The natural construction of the section is that, whatever extent the signification of the word "sequestration" may have, it certainly includes that kind of sequestration which a Scotch landlord can put in force to give effect to his right of hypothec. The sequestration, therefore, if the sect. 163 were to be read alone, would be utterly void. But the English Court of Appeal has (we admit) decided that sect. 163 is to be read with sect. 87 : *In re Exhall Coal Mining Company* (1) ; so that where the creditor or landlord can make out a case in which it is just in the opinion of the Court that he should pursue his remedy, he will be allowed to do so, so far as it is considered just, on proper terms, notwithstanding sect. 163 : *In re Lancashire Cotton Spinning Company* (2) (where the logic of that decision was called in question) ; *In re Oak Pits Colliery Company* (3) ; *In re Brown, Bayley, & Dixon* (4) ; *In re David Lloyd & Co.* (5) ; *In re South Kensington Co-operative Stores* (6). The result of those cases and others is that a mortgagee will generally, and almost as matter of course, be allowed to pursue his remedy against the property which is his own, subject to redemption. But a landlord has no property in the goods on

(1) 4 D. J. & S. 377.
(2) 35 Ch. D. 656.
(3) 21 Ch. D. 322.
(4) 18 Ch. D. 649.
(5) 6 Ch. D. 339.
(6) 17 Ch. D. 161.

NORTH, J. 1890 *In re* WANZER, LIMITED.

the premises, and he is in no better position than the other creditors as to priority, except that so far as the liquidator has beneficially occupied the premises for the purpose of liquidation, the rent for the period of the liquidator's occupation is to be paid in full, as part of the costs of the winding-up. We have offered to pay such part of the rent; and if there was an application now before the Court for that purpose by the landlords, they would not be entitled to leave to sequester on any terms.

A Scotch landlord's rights are not identical with those of an English landlord, but they are no higher; the Scotch landlord cannot proceed without the aid of a Court of law. Assuming that the Scotch landlord's rights are higher than an English landlord's, they are not identical with those of a mortgagee; and the Court will not extend the principle of *In re Exhall Coal Mining Company* (1) beyond the facts of that case: *In re Lancashire Cotton Spinning Company* (2).

Cozens-Hardy, Q.C., and *Chadwyck Healey*, for the Respondents:—

In the first place, a Scotch "sequestration" is not aimed at by sect. 163. All the words used in that section relate to English proceedings, and the Scotch landlord's remedy is of a different nature to any of the processes mentioned in that section.

If we are wrong on that point, we now ask for leave under sect. 87 to proceed. The evidence shews that the right of the Scotch landlord is in the nature of a charge on the goods for the whole of the rent of the current year; that being so, in the absence of special circumstances, leave will be given as matter of course: *In re David Lloyd & Co.* (3).

The Court will not put the parties to expense of a fresh application for that purpose.

Napier Higgins, in reply.

1890. Dec. 13. NORTH, J.:—

This was a motion by the liquidator of *Wanzer, Limited*, a limited company, to restrain by injunction a Scotch landlord

(1) 4 D. J. & S. 377. (2) 35 Ch. D. 656. (3) 6 Ch. D. 339.

from taking any further proceedings on a petition for sequestration, commenced and prosecuted by him before the Sheriff's Court at *Glasgow*; and for a declaration that what was done under the proceedings was void to all intents, and that the landlord may be ordered to withdraw.

Now, what happened was this. The *Wanzer Company*, under an agreement dated the 17th of April, 1890, took certain premises in *Glasgow*, consisting of a shop under a lease for three years from Whitsunday, 1890, at a rent of £230, payable half-yearly; and, soon afterwards, they entered into possession. In the month of August of the same year, before any rent was due, a petition was presented, and a winding-up order was made in this country; and on the 1st of September the provisional liquidator, who afterwards became official liquidator, took possession of the shop. About the middle of October the landlord was informed by the liquidator's agent that he was likely to leave soon. The result was that on the 16th of October the landlord commenced proceedings by petition in the Sheriff's Court of *Lanarkshire*, at *Glasgow*, in what we should call an action. It is headed by the name of the landlord, which was a company and their manager, called the Pursuers, against the *Wanzer Company* as Defenders. It stated that the Pursuers petition the Court to sequester the whole of the stock, furniture, and effects which are or have been since Whitsunday, 1890, on the premises, and to grant warrant to the officer of the Court to inventory and secure the same in security, and for payment to the Pursuers of the £115, being the half-year's rent to accrue due at Martinmas, and the other £115 to accrue due at May, 1891, with interest and expenses; and to grant warrant to an auctioneer named to sell the whole, or so much of the sequestrated effects as should be sufficient to satisfy the demand; but so that no sale was to take place till the Martinmas rent or the Whitsunday rent, 1891, had become due and remained unpaid. Then, after satisfaction by payment, sequestration might be recalled. Following upon that a document was put in under which the landlord claimed to have a right of hypothec over the whole of the furniture on the premises. Then on the same day the sheriff-substitute for the county ordains that the Defenders be served with a copy of the petition, and if

NORTH, J. 1890 *In re* WANZER, LIMITED.

they intend to shew cause why the prayer of the petition should not be granted, are to take certain proceedings, in default of which the petition will be confessed against them. That is a short summary of what was done. Then at the end comes this: "Meantime sequestrates and grants warrant to sequester the goods on the premises for the rent of this current year."

Under that the officer of the Court takes possession on the same day. Then he makes the inventory and secures the stock; and at the end it is said to be "to remain under sure fence and sequestration" to secure the rent of the current year—that is, for payment when the time arrives for payment. That step having been taken, the same day, as I said, the sheriff's officer entered. Then the liquidator commenced proceedings which resulted in the present motion being heard, that it be declared that these proceedings were void under the *Companies Act*, 1862, which applies to *Scotland* as well as to *England*.

Now the first question is under the 163rd section of the Act of 1862. That provides: "Where any company is being wound up by the Court or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents." Is this a proceeding for a sequestration under the section which I have read, that being the section covering Scotch proceedings as well as English? Upon that point I do not find a definite opinion expressed by any witness for the landlord that it is not a sequestration. I find in the opinion given by Professor *Rankine* that, in answer to a question as to whether there was any case since the *Companies Act*, 1862, in *Scotland*, applying to a trustee or liquidator claiming under the 163rd section, he says "No;" and after referring to another statute, which I do not think is very material, he adds this: "and that poinding of the ground, a diligence which proceeds on the same principles as landlords' sequestration, has been held not to be struck at by the 163rd section of the *Companies Act*, 1862, on the ground (which is equally applicable in the present case) that it operates no new preference, but simply makes available a preference already existing." He does not say that, according to Scotch law, a

sequestration in respect of landlords' rent does not come within that section; and the opinion also given on the same side by Mr. *Balfour* does not do so either. What he says is: "I also agree with Mr. *Rankine* in thinking, for reasons similar to those given in regard to poinding of the ground in the case of *Athole Hydropathic Company* v. *Scottish Provincial Assurance Company* (1), that a landlord's sequestration is not the putting in force of an execution against the estate and effects of the company within the meaning of sect. 163 of the *Companies Act*, 1862, and that, consequently, the memorialists' process of sequestration is not void under that section." But he does not say that the Scotch law is that the word "sequestration" there does not include a landlord's sequestration for rent. It is very difficult to see why it should not. He does say, no doubt—in fact, both these learned gentlemen say—that a proceeding by way of poinding of the ground, as it is called, under a heritable bond, is not an execution, and upon that ground is not within that section; and far be it from me to say that poinding of the ground under such a bond is an execution; but this is not the question I have to decide.

Then it is suggested that the word "sequestration" is an English word, used in an English Act, and that it must have the same meaning that it would have in *England*; and inasmuch as there is no sequestration in *England* by way of a landlord in respect of his rent, therefore sequestration here cannot apply to such a case. I do not follow that at all. Sequestration is a word large enough to apply to all sequestrations; this is called a proceeding in sequestration, and how it can be said that such a sequestration is not a sequestration I do not quite understand. Then, further, look at the words in company with which it is found. It is, "any attachment, sequestration, distress, or execution." Now, a distress is the remedy that a landlord has by law to take possession of property, and to levy the rent that is due to him out of it. I do not say the two proceedings are the same—I think that it is clear they are not. The Scotch hypothec that a landlord has is distinguished in some points from a right of distress; but they are both *in pari materiâ*, and it is very difficult

(1) 13 Court Sess. Cas. 4th Series, 818.

NORTH, J.
1890
In re WANZER, LIMITED.

to see on what ground it could be said that a Scotch landlord is to have a different right given to him in respect of sequestration for rent from what an English landlord has in respect of distress, unless upon the ground that I will consider presently.

Then there is another thing to be borne in mind. Under the *Bankruptcy Act* in *Scotland* in 1856, the landlord's right was intended to be unaffected by that Act. That is expressly provided in sect. 119, which says, "Nothing in this Act contained shall affect the landlord's right of hypothec." But there are no such words to be found in the *Companies Act* of 1862, which was passed only five or six years later; and one would expect that, if the landlord's right of hypothec was to be excepted we should find something of that sort in the Act itself.

Then it is suggested that the landlord's proceeding is not a sequestration upon this principle: that the sequestration given to a landlord by Scotch law does not create any new preferential right, but merely renders available a right already existing. I cannot understand how, for that reason, a sequestration for rent can be said not to be a sequestration. It may be a very good reason why, if such a sequestration is within sect. 163, the Court under sect. 87 should give leave to proceed; but that is a totally different thing. In my opinion, the word "sequestration," used in the 163rd section, does apply to the landlord's right of sequestration to secure rent given to him by the Scotch law: and does render it void to all intents.

But I have said this with respect to the 163rd section alone. That does not end the case, because, according to decisions which are binding upon me, the 163rd section and the 87th section are to be construed together; and, therefore, "void to all intents" is to be read, as qualified by the 87th section, as meaning "void to all intents, unless the Court shall otherwise direct"; that is to say, unless the Court authorizes the proceedings to be instituted which lead up to the sequestration, or authorizes their continuance if already instituted before the sequestration takes place.

Then we must turn to the 87th section: "When an order has been made for winding up a company under this Act no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court,

and subject to such terms as the Court may impose." The question upon that section is, whether this action in *Scotland* is a proceeding within the meaning of the section. This is not a question of Scotch law. I am satisfied that it is a proceeding; and although, as I say, it is not a question of Scotch law, I have the satisfaction of having Mr. *Balfour's* opinion to the effect that, if a Scotch Court had construed this section, they would hold that this action was a proceeding within the meaning of the 87th section.

Therefore, it comes to this—that the proceeding is one which is not to be commenced or proceeded with without the sanction of the Court, and the Court has not given any sanction. That being so, the 163rd section applies, and the liquidator is now entitled to the order that he asks.

But then that does not end the case, because it would still be open to the landlord to apply to the Court for leave to proceed under the 87th section, and Mr. *Hardy* has asked me now to consider that application as made, if I am against him on the first point, as I am.

Then it is necessary to consider whether, if the application had been made, leave would have been granted. That leads me to consider what is the precise position of the landlord in *Scotland* with respect to proceeding by way of sequestration for his rent. Now, as to that, I think it proved on the evidence that the effect of the Scotch law is to give the landlord "a real security without possession," as it is called, upon the property demised, and the stock, in respect of his rent; and there is this peculiarity about it in Scotland that does not exist in England: that it is a right to do this by way of anticipation before the rent is due. In that respect it differs altogether from the English right of distress, which can only be put into force after the rent has actually become due. In Scotland it may be done before the rent becomes due; and, in this case, that was the course adopted, for, the first rent becoming due on the 11th of November, this proceeding is taken a month before that time.

In my opinion, this is a case in which by Scotch law the landlord has a security given to him for rent to become due; and, in my opinion, he is by Scotch law a secured creditor.

NORTH, J. 1890 *In re* WANZER, LIMITED.

Then the question is, what the result of that is; and I am reminded of the cases in which a mortgagee is allowed, pretty much as a matter of course, if the relief he asks for is not conceded, to commence proceedings after the winding-up, or after the winding-up to continue proceedings commenced before, for the purpose of realizing his security. It is said that the mortgagee's right depends upon this, that he is only taking proceedings to recover his own property; whereas, the landlord in Scotland has no property whatever in the furniture and stock of his tenant; but has merely a right to be enforced by a judicial proceeding. In my opinion, that does not affect the case. He has a security which he has a right to enforce which the Scotch law gives him, and it seems to me more like the position of a debenture-holder than anything else, although it is not exactly the same as that. I think, therefore, that if the landlord had, before commencing these proceedings, asked for leave to take proceedings by way of sequestration, the Court would have given him leave to do so.

The question is, whether I should give it now. I am prepared to do so upon terms. Down to this time the landlord has been entirely in the wrong, because he has commenced and prosecuted proceedings which, in my opinion, he had no right to do, and in respect of which proceedings costs have been incurred. But I do not think it necessary to put the landlord to commence fresh proceedings, as I should now give him leave to do if he asked for it. I am prepared to put him now in the same position as if there was a motion pending before me at his instance to obtain leave to continue his proceedings for a sequestration; but I can only give him that leave upon the payment of the costs of the liquidator in the proceedings in which, down to this time, in my opinion, the landlord has been entirely in the wrong.

Solicitors for Applicants: *Munns & Longden.*
Solicitors for Respondents: *Belfrage & Co.*

D. P.

NORTH, J.
1890
Dec 11, 16.

CORPORATION OF WOLVERHAMPTON *v.* BILSTON COMMISSIONERS.

[1889 W. 2375.]

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 51, 52 [*Revised Ed. Statutes, vol. xvii., pp.* 528, 543]—"*Water Company*"—*Water Supply*—*Own Profit.*

The undertaking of a waterworks company was transferred by statute to a borough. The profits of the waterworks were under a subsequent statute to be transferred to the borough improvement fund, or at the option of the corporation to be applied in reducing the price of water to consumers:—

Held, that the corporation were supplying water for their own profit, and were a water company within the meaning of sect. 52 of the *Public Health Act*, 1875.

THE Plaintiffs were suing as owners of waterworks whose limits of supply included the Defendants' district. The Defendants were the urban local authority, established by Act of Parliament passed in 1850, for the township of *Bilston*, a district within the mother parish of *Wolverhampton*, but without the borough of *Wolverhampton*.

By the *Wolverhampton Waterworks Transfer Act*, 1867 (30 & 31 Vict. c. 133), the undertaking of the *Wolverhampton New Waterworks Company* (a company then supplying the *Bilston* township with water), was transferred to the corporation of *Wolverhampton*, the rights and liabilities of the *Wolverhampton New Waterworks Company* being continued in favour of and against the corporation. By that Act an agreement between the *Wolverhampton New Waterworks Company* and the Defendants, dated the 16th of May, 1866, for the supply of water by the *Wolverhampton New Waterworks Company* to the Defendants for a term of fourteen years, was confirmed and made perpetual subject to a right for either the *Wolverhampton Corporation* or the *Bilston Commissioners* to have the price to be paid for the water readjusted at the expiration of successive periods of twenty-one years. There was no express provision in the Act as to the application of the profits arising from the waterworks undertaking. In consideration of the transfer, it was provided that the corporation should pay to

NORTH, J. 1890 CORPORATION OF WOLVERHAMPTON v. BILSTON COMMISSIONERS.

the *Wolverhampton New Waterworks Company* certain sums up to the 6th of January, 1872, and after that £4000 every year.

By the *Wolverhampton Improvement Act*, 1869 (32 & 33 Vict. c. 131), s. 187, it was provided: "The corporation shall from time to time set apart out of the profits of their waterworks undertaking, but not out of any other receipts, such sum as they shall think proper to form a reserve fund to meet contingencies, or for repairing or improving from time to time works connected with that undertaking, and may invest and accumulate the sum so set apart in the way of compound interest or otherwise, until the reserve fund amounts to a sum of five thousand pounds, and from time to time, if and as occasion requires, shall apply the reserve fund to the purposes for which it is created, and shall so proceed from time to time, if and as the amount thereof is reduced by such application; and as long as the reserve fund unapplied amounts to five thousand pounds, they shall carry the interest, dividends, or annual income thereof to the improvement fund under this Act, and the same shall form part of that fund."

Sect. 322 (2) and (3), provided for the application of the improvement fund as follows: "(2) Out of the improvement fund there shall be paid all the expenses of the corporation, including the sewerage expenses, except such as are under the *Municipal Corporation Acts*, or any other former Act or this Act, payable out of the borough fund. (3) In case the improvement fund is at any time more than sufficient to pay the expenses payable thereout, the surplus thereof shall be applied, under the direction of the council, for the public benefit of the inhabitants or improvement of the borough."

A provisional order of the Local Government Board relating to the borough of *Wolverhampton* was confirmed by the *Local Government Board's Provisional Order Confirmation Act*, 1888.

Art. 13 of the provisional order repealed sect. 187 of the *Wolverhampton Improvement Act*, 1869, and substituted provisions to this effect: "The corporation shall keep accounts in respect of their water undertaking separate from all their other accounts, distinguishing therein capital from income, and shall apply all money from time to time received by them on account of revenue

in the manner and in the order following, that is to say:" (1) and (2) in payment of costs of collecting rates and to expenses properly chargeable to revenue; (3) in payment of the annuities payable to the *Wolverhampton New Waterworks Company*; (4), (5), (6), and (7) in payment of interest and capital of money borrowed for waterworks purposes; (8) in providing and replacing a reserve fund for waterworks purposes up to the value of £10,000, and concluded as follows: "The corporation shall carry any balance of such revenue remaining in any year and exceeding the sum of £500 to the improvement fund, or (if so determined by resolution of the corporation) shall apply such balance, or any part thereof, in reducing the price of water to consumers as and for so long as the corporation may by resolution determine."

This was the trial of an action in which the Plaintiffs claimed an injunction to restrain the Defendants from supplying, or taking steps to supply, the township of *Bilston* with water other than water supplied by the Plaintiffs under the agreement of the 16th of May, 1866, as modified by statute; or that in the alternative it might be declared that the Plaintiffs were a "water company" within the meaning of the *Public Health Act*, 1875, and that the Plaintiffs might be restrained from commencing to construct waterworks within the limits of supply of the Plaintiffs so long as the Plaintiffs were able and willing to supply water proper and sufficient for all reasonable purposes for which it was required by the Defendants, in accordance with the provisions of sect. 52 of the *Public Health Act*, 1875.

Defences of both fact and law were raised. It was pleaded by the Defendants that the Plaintiffs had not in fact kept their part of the agreement by supplying water in sufficient quantity and of proper quality. It was arranged that the trial of the issues relating to that part of the defence should be postponed, and that the following questions of law raised by the Defendants, partly on their pleadings and partly at the bar, should be now tried, viz., whether, on the construction of the agreement of the 16th of May, 1866, the Defendants were or not bound to take their supply of water exclusively from the Plaintiffs; whether, if on the construction of the agreement they were bound to take their whole supply of water from the Plaintiffs, they were or not,

NORTH, J. 1890 CORPORATION OF WOLVERHAMPTON v. BILSTON COMMISSIONERS.

nevertheless, entitled either under their own Act of 1850, or under sect. 51 of the *Public Health Act*, 1875, to obtain an independent supply of water; and whether or not, in case they would otherwise have been empowered by sect. 51 of the *Public Health Act*, 1875, to obtain such independent supply, they were restricted by sect. 52 of that Act from doing so, because the Defendants were a "water company" able and willing to supply water to the Defendants, whose district was within the limits of supply of the Plaintiffs.

Cozens-Hardy, Q.C., *Underhill*, and *Ernest Moore*, for the Plaintiffs:—

As to the power of the Defendants to get a supply of water under sect. 51 of the *Public Health Act*, 1875—that power which is, in effect, the same power as existed under the *Public Health Act*, 1848, when the transfer Act was passed, cannot override and make nugatory a positive enactment contained in the transfer Act.

Supposing, however, that sect. 51 would otherwise have any application, the Defendants are precluded by sect. 52 from putting in force the provisions of sect. 51, because the Plaintiffs are a water company within whose limits of supply the Defendants are desirous of supplying water. They are a water company within the interpretation clause (sect. 4) of the Act, being a corporate body supplying water for their own profit; that they are to take profits as their own is recognized by the Acts.

Moulton, Q.C., and *Upjohn*, for the Defendants:—

The effect of the agreement, which has been made perpetual by Act of Parliament, does not deprive the Defendants of their power under sect. 51 of the general Act. Sect. 52 does not interfere with the powers of the Defendants under sect. 51, because the Plaintiffs are not a "water company" within the meaning of the Act. They do not supply water for their own profit. The corporation, apart from the corporators, is not a body that can enjoy profits. The corporators, as such, can receive no profits; the profits are applicable entirely for public

purposes, and cannot be said in any proper sense to be the "own profit" of either the corporation or corporators.

NORTH, J. (without calling for a reply, decided, on the construction of the agreement of the 16th of May, 1866, and the effect of the *Wolverhampton Waterworks Transfer Act*, 1867, that there was an obligation on the Defendant commissioners to take their water supply exclusively from the Plaintiffs, so long as the Plaintiffs supplied sufficient water of the usual good quality, and fit for all ordinary purposes; and that, on the principle of *Luker* v. *Dennis* (1), an injunction would be granted to restrain the Defendants from breaking their agreement, so long as the Plaintiffs performed their part of the agreement, and then continued):—

Then the further point raised was this. It was said that if the Defendants were wrong on that point, as I hold they are, and that they are bound by the agreement to take the full supply from the Plaintiffs, they have a right to look to the provisions of sect. 51 of the *Public Health Act*, 1875, and that sect. 52 does not stand in their way. Now, sect. 51 is this: "Any urban authority may provide their district or any part thereof, and any rural authority may provide their district or any contributory place therein, or any part of any such contributory place, with a supply of water proper and sufficient for public and private purposes, and for those purposes or any of them may: (1.) construct and maintain waterworks, dig wells, and do any other necessary acts; and (2.) take on lease or hire any waterworks, and (with the sanction of the Local Government Board) purchase any waterworks, or any water or right to take or convey water, either within or without their district, and any rights, powers, and privileges of any water company; and (3.) contract with any person," which, of course, would include a corporation, "for a supply of water." It is said that under that the *Bilston Commissioners* are authorized to construct and maintain waterworks and dig wells, and so on.

[His Lordship referred to the pleading as to matters not relevant to this report, and proceeded:—]

I do not think it is necessary to consider that further, because,

(1) 7 Ch. D. 227.

NORTH, J. 1890

CORPORATION OF WOLVERHAMPTON v. BILSTON COMMISSIONERS.

taking it to be as they say, there is a limitation contained in the 52nd section, which is: "Before commencing to construct waterworks within the limits of supply of any water company empowered by Act of Parliament or any Order confirmed by Parliament to supply water, the local authority shall give written notice to every water company within whose limits of supply the local authority are desirous of supplying water, stating the purposes for which and (as far as may be practicable) the extent to which water is required by the local authority"; and then: "It shall not be lawful for the local authority to construct any waterworks within such limits if and so long as any such company are able and willing to supply water proper and sufficient for all reasonable purposes for which it is required by the local authority; and any difference as to whether the water which any such company are able and willing to lay on is proper and sufficient for the purposes for which it is required, or whether the purposes for which it is required are reasonable, or (if and so far as the charges of the company are not regulated by Parliament) as to the terms of supply, shall be settled by arbitration." Now, it is said that that section does not apply, because the Plaintiffs are not a water company to whom the Defendants are bound to give notice under the 52nd section. That argument rests on this. The term "water company," as defined by the Act in the interpretation clause, sect. 4, "means any person or body of persons corporate or unincorporate supplying or who may hereafter supply water for his or their own profit." The company supplying the water originally was the *Wolverhampton Waterworks Company*, and there is no question but that they were a body of persons corporate supplying water for their own profit. Afterwards, their undertaking was transferred to the *Wolverhampton Corporation*; and under the Act of 1869, sect. 187: "The corporation shall from time to time set apart out of the profits of their waterworks undertaking, but not out of any other receipts, such sum as they think proper to form a reserve fund to meet contingencies, or for repairing or improving from time to time works connected with that undertaking, and may invest and accumulate the sum so set apart in the way of compound interest or otherwise, until the reserve fund amounts to a sum of £5000, and from

time to time, if and as occasion requires, shall apply the reserve fund to the purposes for which it is created, and shall so proceed from time to time, if and as the amount thereof is reduced by such applications; and as long as the reserve fund unapplied amounts to £5000, they shall carry the interest, dividends, or annual income thereof to the improvement fund under this Act, and the same shall form part of that fund."

The result is that the receipt of profits by the Plaintiffs is recognised by the Legislature. The profits were given them by the *Transfer Act* of 1867, and the *Improvement Act* of 1869 compels them to apply a portion of the profits towards the reserve fund without making any provision for the rest of the profits. Then the Act of 1888, which confirms the provisional order, makes some alteration in that. The Provisional Order by article 13 repeals sect. 187 of the Act of 1869, and in lieu thereof the following provisions are to take effect, namely: "The corporation shall keep accounts in respect of their water undertaking separate from all their other accounts, distinguishing therein capital from income, and shall apply all money from time to time received by them on account of revenue in the manner and in the order following." Then various things are laid down as expenses to be incurred from that source, and by the 8th sub-clause of that article they are to apply such yearly sum as they think proper to form a reserve fund, and there are considerable details given as to the reserve fund, and this is provided: "That the corporation shall carry any balance of such revenue remaining in any year, and exceeding the sum of £500, to the improvement fund, or (if so determined by resolution of the corporation) shall apply such balance, or any part thereof, in reducing the price of water to consumers, as and for so long as the corporation may by resolution determine." Now that differs from the 187th section in two points only. The word "profits" is not used, nor the words "surplus of profits," but it provides that this surplus or balance, give it whatever name you please, which would remain from the profits of the undertaking (meaning the excess of the receipts over disbursements), is to be carried, first of all, to a reserve fund, to a limited amount, and then the balance is to be applied either by carrying it to the

NORTH, J.
1890
CORPORATION OF WOLVERHAMPTON v. BILSTON COMMISSIONERS.

improvement fund, or they may, if they please, apply the balance, instead of keeping it, for reducing the water rates. But, in my opinion, that is not a substantial alteration of the application of this surplus fund. If that was profits down to this time, the fact that the word "profits" is not used with respect to it in this provisional order does not make any difference. Then we come to the interpretation clause. Is this or not a water company? The corporation is a body of persons incorporated who supply water. Is it for their own profit? In my opinion it is for their own profit, because they make a profit out of it, and that profit is to be applied in the way indicated. I do not think it turns on the question whether the year happens to be a profitable year or not; but it is a case in which the rates are so regulated that there is a surplus left of profits over expenditure. In my opinion the corporation are a corporation entitled to receive notice under sect. 52 of the Act.

[His Lordship decided also that the Defendants had not a right under their own Act of 1850 to seek an independent supply of water notwithstanding the statutory agreement, and made a declaration in favour of the Plaintiffs on all the issues now argued, and directed the rest of the trial to stand over till next sittings.]

Solicitors for Plaintiffs: *Sharpe, Parkers, Pritchard, & Sharpe*, agents for *H. Brevitt, Wolverhampton.*

Solicitors for Defendants: *Woodcock, Rylands, & Parker*, agents for *J. D. Wassell, Bilston.*

D. P.

NORTH, J.
1890
Dec. 17.

In re SMITH.
WILLIAMS *v.* FRERE.

[1890 S. 1704.]

Practice—Order to attend and produce Documents—Third Party—Power to make Order ex parte—Right of Person Summoned to raise Objections to Production—Rules of Supreme Court, 1883, *Order* XXXVII., *r.* 7.

An order made under rule 7 of Order XXXVII. for the attendance of a person for the purpose of producing documents is equivalent to a *subpœna duces tecum*, and has the same effect. Such an order, though unqualified in its terms, means that the person named in it must attend with the documents therein mentioned; but it is then open to him to raise any legal objection to the production of any particular document which he is asked to produce.

The production under rule 7 is not a production for the purpose of private inspection, but must have reference to some proceeding in the litigation.

An order under rule 7 may be made *ex parte*, and it may be made upon a person who is not a party to the action.

MOTION to discharge an order made in Chambers, for the attendance of certain persons before an examiner to produce certain books and documents mentioned in the order.

Henry Smith was a partner in a firm of *Fuller, Smith & Turner*, who carried on the business of brewers at *Chiswick*. The other partners were *G. P. Fuller*, *W. F. Fuller*, and *Frank Smith*.

The articles of partnership provided that *Henry Smith* should be at liberty, either by deed or will, to transfer his share, or any part of his share, in the partnership business and property to *Frank Smith* and *E. T. Turner*, or either of them.

Henry Smith died on the 30th of December, 1887, having by his will nominated *Frank Smith* and *E. T. Turner* to succeed to his share in the partnership. And he bequeathed all his share and interest in the partnership, and in the capital, assets, and property thereof, to *Frank Smith* and *E. T. Turner*, in the proportions of four-fifths of such share to *Frank Smith*, and of one-fifth thereof to *E. T. Turner*, subject to the condition that they should bring the value of the said brewery share and interest,

NORTH, J.
1890
In re SMITH. WILLIAMS *v.* FRERE.

as existing at his death, into account with his clear residuary estate thereinafter bequeathed, in order to enable that estate to be divided in the shares, and proportions, and otherwise in the manner, thereinafter directed, and at the same time to vest, according to his wish, the entirety of his said brewery share and interest in *Frank Smith* for four-fifth parts, and in *E. T. Turner* for the other fifth part thereof. The testator bequeathed the residue of his estate, regarded as supplemented by the value of his said brewery share and interest, as thereinbefore directed, in the proportions therein mentioned, to *Frank Smith*; the trustees of the will of *J. E. Turner*, deceased; *E. T. Turner*; and *F. Sims Williams*.

This action was commenced by originating summons by *F. Sims Williams*, as Plaintiff, against the trustees and executors of the testator's will; *Frank Smith*; *E. T. Turner*; and the trustees of the will of *J. E. Turner*.

On the 2nd of August, 1889, an order was made, as asked by the summons, directing that the following inquiries should be made: (1.) What was the value of the share and interest of the testator, as existing at his death, in the partnership and in the capital, assets, and property thereof. (2.) What sums ought to be brought into account in the division of the testator's residuary estate in respect of the several shares in the said share of the said partnership, and the capital, assets, and property thereof, by the will bequeathed to *Frank Smith* and *E. T. Turner* respectively.

The Defendants, *Frank Smith* and *E. T. Turner*, were required to make discovery of documents, and they objected to produce any documents of the partnership, on the ground that those documents belonged to themselves jointly with *G. P. Fuller* and *W. F. Fuller*, who were not parties to the action.

On the 15th of November, 1890, an order was made by the Chief Clerk in Chambers, on the application of the Plaintiff, that *G. P. Fuller*, *W. F. Fuller*, and the Defendants *Frank Smith* and *E. T. Turner*, being all the members constituting the firm of *Fuller, Smith, & Turner*, "do attend before the examiner appointed to take the examination of witnesses in this action, and produce the partnership books of the said firm, including

particularly the balance-sheets and profit and loss accounts of the said firm for the years 1888 and 1889," and certain other documents specifically mentioned in the order.

No notice of the application for this order was served upon *G. P. Fuller* or *W. F. Fuller*.

This was a motion by *G. P. Fuller* and *W. F. Fuller*, asking that the order of the 15th of November might be discharged, so far as it was directed to or affected the Applicants, or either of them. The notice of motion was served upon the Plaintiff and the Defendants.

Cozens-Hardy, Q.C., and *J. Henderson*, for the motion:—

The order purports to be made under rule 7 (1) of Order XXXVII. An order under that rule ought not to be made *ex parte*. The testator had no power under the articles of partnership to impose any obligation or duty on any one, except on the persons whom he nominated to succeed to his share. Strangers to the action cannot under this rule be required to produce books belonging to them which can have no bearing on the only question in the action—that is, the value of the testator's interest in the partnership at the time of his death. The balance-sheets for years subsequent to the testator's death can have no bearing on this question. Under rule 7 the Court has no jurisdiction to compel production of documents by a third party: *Straker* v. *Reynolds* (2); *Elder* v. *Carter* (3). At any rate, the order ought not to be an absolute one for production; the person summoned will be liable to be punished under rule 8 for contempt of Court if he does not produce the documents. The order ought expressly to protect him from being required to produce any documents

(1) Rule 7: "The Court or a Judge may in any cause or matter at any stage of the proceedings order the attendance of any person for the purpose of producing any writings or other documents named in the order which the Court or Judge may think fit to be produced: Provided that no person shall be compelled to produce under any such order any writing or other document which he could not be compelled to produce at the hearing or trial."

Rule 8: "Any person wilfully disobeying any order requiring his attendance for the purpose of being examined or producing any document shall be deemed guilty of contempt of Court, and may be dealt with accordingly."

(2) 22 Q. B. D. 262.

(3) 25 Q. B. D. 194.

NORTH, J.
1890
In re SMITH.
WILLIAMS *v.* FREERE.

which he would not be compelled to produce at the trial. That is the meaning of the proviso to the rule. The person summoned ought not to be subject to the burden of shewing, when he attends, that he is not bound to obey the order.

Napier Higgins, Q.C., and *Sidney Woolf*, Q.C., for the Plaintiff:—

An order under rule 7 is equivalent to a subpœna to attend as a witness and produce documents, and has the same operation as such a subpœna. The rule does not compel discovery, properly so called. It is open to the person summoned under the rule, when he attends with the documents specified in the order, to take the same objections to their production as he could have taken under a subpœna. The subpœna was as absolute in form as the order made in the present case, and yet it was always open to the person summoned to take any lawful objection to the production of any of the documents specified. Rule 7 is similar to sect. 5 of 1 Will. 4, c. 22, and ss. 46 & 47 of the *Common Law Procedure Act*, 1854: *Elder* v. *Carter* (1). A subpœna would issue *ex parte* and as a matter of course. Rule 7 is also similar in its terms to sect. 40 of 3 & 4 Will. 4, c. 42, under which it was held that a rule to compel the attendance of witnesses and the production of documents before an arbitrator was a rule absolute in the first instance: *In re Guarantee Society and Levy* (2); *Webster* v. *Davies* (3). In *Elder* v. *Carter*, and in *Straker* v. *Reynolds* (4), the production of documents by a third party was sought, not for the purpose of any motion or other proceeding before the Court, but for the purpose of private inspection. It was to such a production that the observations of the Judges were directed; and the order made in the present case is quite consistent with those cases. The Applicants will be able to raise before the examiner any legitimate objection, such as privilege, to the production of any document.

Grosvenor Woods, for the other partners.

(1) 25 Q. B. D. 194.
(2) 1 Dowl. & L. 907.
(3) 29 Sol. J. 372.
(4) 22 Q. B. D. 262.

Cozens-Hardy, in reply:—

No authority for making such an order *ex parte* has been cited; in all the cases upon rule 7 which have been referred to the order was made upon hearing the person summoned. *Webster* v. *Davies* (1) has no application; it had nothing to do with a *subpœna duces tecum*.

This order is a judicial act of a hostile character, and disobedience to it will involve a contempt of Court. The examiner cannot, if an objection is raised to production, decide whether any of the documents ought to be produced; the question must be decided upon a motion to attach for disobedience to the order. The proviso to rule 7 fetters the discretion of the Court. The rule does not justify the making of an absolute unqualified order for production; the order ought to be expressly limited to documents which the person summoned could be compelled to produce at the trial.

NORTH, J.:—

I think the objections which have been taken to the order are not well founded. The history and objects of rule 7 were fully explained by the Lords Justices in *Elder* v. *Carter* (2), and the order made here is exactly in the form of the ordinary subpœna to produce documents. It is said that no one can go behind the order, and that if the persons summoned do not produce the documents they will be guilty of a contempt of Court. The ordinary *subpœna duces tecum* runs in this way: "We command you to attend at, &c., and so from day to day until the above cause is tried, to give evidence on behalf of, &c., and also to bring with you and produce" the documents specified, so that the direction of the subpœna is positive that the documents specified are to be produced. But that does not mean that no objection can be taken to their production at the trial; it means that they are to be there for production; and then we know that, under the ordinary subpœna, it is open to the Judge to say that the witness is not bound to produce the documents which he has there. That is equally open here, because of the proviso to the rule, "That no person shall be compelled to produce under any

(1) 29 Sol. J. 372. (2) 25 Q. B. D. 194.

NORTH, J.
1890
In re SMITH.
WILLIAMS *v.* FREERE.

such order any writing or other document which he could not be compelled to produce at the hearing or trial." Therefore, the right which the witness has, without any express reservation, in the case of a subpœna to produce, is expressly reserved to him by rule 7.

It is said that the order ought not to be made *ex parte*. I see no reason why it should not. It is a question of convenience, and a matter for the discretion of the Judge. I do not mean to say that in every case the discretion would be well exercised by making the order *ex parte*—that the order should go as a matter of course *ex parte*. But I see nothing in the rules to prevent the order being made *ex parte*, if the Judge to whom the application is made thinks that the order should be made in that way.

It is said that the discretion is to be exercised judicially. It has been so exercised here. The application has been before the Judge in Chambers, acting by his officer, and the documents mentioned in the order are those which the Judge, acting through his Chief Clerk, thought fit to be produced. It is true that the present Applicants were not there; but the order is not an adjudication that the documents are to be produced. The only adjudication is, that the persons summoned are to attend with the documents for production. It is true that some difficulty and inconvenience may arise when the person summoned attends with the documents before the examiner, and the examiner cannot deal with the question of production; but I cannot say that the order is bad on that ground. I find that in the similar case of proceedings under an arbitration, when application has to be made to a Judge for an order that a witness shall attend for the purpose of producing documents, the practice has been to make the order *ex parte*, and I cannot say that the procedure under rule 7 ought necessarily or always to be on a different footing—that notice must always be given to the person whom it is intended to summon. Sometimes it may be convenient that notice should be given; but I cannot say that it is imperative, or that the order is wrong simply because it is made *ex parte*.

It is said that the decisions are against this construction of the rule. I do not think so. I think they are in favour of it, bearing in mind how the question arises here. An application

for production of documents has been made against the two Defendants who are partners, and they have claimed immunity from production, on the ground that these documents belong to the other partners as well as to themselves, and that those other partners are not before the Court. It is for the purpose of meeting that objection that this order has been made, that all the four partners—the two who are Defendants and the two Applicants—that is, all the members of the firm to whom the documents belong, do attend and produce them.

The cases bearing on the point are three in number. The first is *Central News Company* v. *Eastern News Telegraph Company* (1), where it was decided that, under Order XXXVII., rule 7, the Judge may at any stage of the proceedings in any cause or matter order the attendance of any person for the purpose of producing such writings or other documents as he could be compelled to produce at the hearing or trial. It was there pointed out by Lord *Coleridge,* C.J. (2), that it would or might be very oppressive to order a person who was not a party to the cause, nor yet a witness, and had in fact nothing to do with the action, to compel him "by process of the Court to produce his private and secret papers for the purpose of some matter connected with a suit in which he has no interest." The Chief Justice was there referring to a production, not at the trial of the action or the hearing of any application in it, but to an independent discovery without reference to any such proceedings. And the judgment of Mr. Justice *Watkin Williams* contains this passage: "If the case was one in which a defendant had written a letter to a third party, and in which such a defendant had an interest, I can well understand that it might not be improper to order its production." The view, therefore, of those Judges is not inconsistent with the view which I am now taking. Again, in *Straker* v. *Reynolds* (3), the application was for leave to inspect at the office of the plaintiffs' solicitor certain books of persons who were not parties to the action, and it was held that the Court had no jurisdiction under rule 7 of Order XXXVII. to make such an order. But Baron *Huddleston* said (4): "An application by the plaintiff

(1) 53 L. J. (Q.B.) 236.
(2) Ibid. 238.
(3) 22 Q. B. D. 262.
(4) Ibid. 263.

NORTH, J. 1890 *In re* SMITH. WILLIAMS *v.* FRERE.

to the Judge at Chambers to order the 'attendance' of these contractors 'for the purpose of producing' their books would have been within the terms of rule 7, and, if this had been an application of that character the propriety of granting it might have been considered. The contractors might perhaps under the rule have been ordered to attend with their books, in order that it might be ascertained whether the books contained entries relevant to the matters in dispute." And, again, Mr. Justice *Wills* said (1): "In my opinion the rule was intended by those who framed it to be strictly construed, and I think that it gives the Court or a Judge power to order the production of documents for the purpose of the preliminary examination of witnesses before the trial, but does not give the Court or a Judge power to order inspection, properly so called, before the trial, of documents in the hands of persons who are not parties to the action," distinguishing clearly between production for the purpose of the examination of a witness, and production to a person for his own private inspection. Again, in *Elder* v. *Carter* (2), before the Court of Appeal, the application was by summons against a company not a party to the proceedings, for the production of certain documents "for the inspection of the defendant and his solicitors or agents, and to permit him or them to make copies of or extracts therefrom of the entries relating to the said shares; and asking also that the action might be stayed until such inspection should be had." The company were the only respondents to this summons, and the discovery was sought for the general purposes of an interpleader issue, and not for the purpose of any summons or motion pending before the Court. That is entirely distinguishable from the present case, and the decision that the Defendant was not entitled to such inspection does not touch the present case. The observations then made by the Lords Justices in giving their judgments in many respects entirely support the view which I take. For instance, Lord Justice *Lindley* said (3): "You must look at this rule with reference to the purpose for which it was introduced; and it cannot be said that that purpose was to give a litigant a right to dis-

(1) 22 Q. B. D. 265. (2) 25 Q. B. D. 194.
(3) 25 Q. B. D. 199.

covery which he did not previously possess against persons not parties to the action. That was not the purpose; so to construe it would be to abuse the rule. The object of it was, to remove the difficulties which existed in compelling production of documents at various stages of the proceedings, both before and after the trial, at the hearing of motions, petitions, summonses and examinations of witnesses, and the like; and that is the real legitimate object of the rule, which is necessarily not confined to production on the hearing of any motion or petition, because there may be some proceedings before an official referee, or an examiner, or a commission to take evidence, to which this rule would apply, and I am not at all desirous of doing more than to say that the rule cannot be construed so as to enable a litigant to obtain discovery from any person who is not a party to the proceedings. That is what is sought by this application." Then Lord Justice *Bowen* said (1): "In the present instance the production of the documents at the present moment cannot be necessary for the purpose of justice. Who ever heard that there was a right on the part of a litigant, at a time when there was no pending motion and no pending trial, to obtain inspection of a document which belongs to a third person, unless indeed in the possible case where production of such a document was necessary to carry out an order which had already been obtained?" In the present case an inquiry has been directed for the purpose of informing the Court, and the application is for the production of the specified documents with reference to that inquiry, and Lord Justice *Bowen* evidently thought that in such a case as that inspection might be ordered as against a third party. And, speaking of the object of rule 7, the Lord Justice said (2): "It is not to increase rights as against third persons, but to give further facilities for enforcing rights which already exist." And he added: "But I am as certain as one can be of anything with regard to practice, that it is not intended to enact that at any stage of a proceeding a Judge may make, subject to his discretion, an order on a third person for production of a document which belongs to the third person, unless the production of it at that moment is a thing to which the parties are entitled for

(1) 25 Q. B. D. 200. (2) 25 Q. B. D. 201.

NORTH, J. 1890 *In re* SMITH. WILLIAMS *v.* FRERE.

the purpose of justice; and you are not entitled, for the purpose of justice at any moment during suit, simply because you are a litigant, to see what is in the possession of a third person and to have production of it." That means private production, not production before an examiner or a Judge for the purpose of the proceedings. In my opinion, those observations are all in favour of the validity of the order which has been made in the present case. But, in order to prevent any misunderstanding of the order, I wish to make my meaning quite clear. I think that an order to produce under rule 7 is merely equivalent to the very same words used in a subpœna to produce, which renders it incumbent on the person summoned to attend with the documents specified. But it clearly leaves it open to him when he attends to make any legitimate objection to the production—to shew any legitimate reason why he ought not to be compelled to produce the documents. I must dismiss the motion with costs.

Solicitors: *Frere, Forster, & Co.; Hollams, Son, Coward, & Hawksley; Rooke & Sons.*

W. I. C.

Ex parte KING'S COLLEGE, CAMBRIDGE.

NORTH, J.

1890
Dec. 13.

College—Erection of new Buildings—Application of Purchase-money of Land paid into Court under Lands Clauses Consolidation Act—Repayment by Instalments—Consent of Board of Agriculture—Universities and College Estates Act, 1858 (21 & 22 *Vict. c.* 44), *ss.* 27, 28 [*Revised Ed. Statutes, vol. xiii., p.* 288]—*Universities and College Estates* (*Amendment*) *Act*, 1880 (43 & 44 *Vict. c.* 46), *ss.* 2, 4.

The effect of sect. 4 of the *Universities and College Estates* (*Amendment*) *Act*, 1880, is, that money which has arisen from the sale of land belonging to a college to a railway company, under the *Lands Clauses Consolidation Act*, 1845, and which is standing in Court, cannot be applied in the manner provided by sect. 2 of the first-mentioned Act without the consent of the Board of Agriculture.

PETITION by the provost and scholars of *King's College, Cambridge*, asking that a fund in Court might be applied in paying the cost of some new buildings which were in course of erection at the college.

The petition was entitled, "In the matter of the *Lands Clauses Consolidation Act*, 1845; in the matter of the *Universities and College Estates Acts*, 1858 to 1880; and in the matter of the *London, Chatham and Dover Railway* (*City and Suburban Traffic Station*) *Act*, 1881."

The *London, Chatham and Dover Railway Company*, under the powers conferred on them by their above-mentioned Act, with which the *Lands Clauses Consolidation Act*, 1845, was incorporated, took some land in the city of *London* which belonged to the college. The amount of the purchase-money and compensation was determined by arbitration to be £20,000, and this amount was paid into Court by the company, and was, under an order of the Court, invested in the purchase of £19,536 India 3½ per Cent. Stock. The Petitioners had entered into a contract for the erection of some additional buildings, for the occupation of resident members of the college, for the sum of £25,772. The contract provided for the completion of the buildings by the 15th of August, 1892. The contract price was payable by instalments. The Petitioners desired to have the sum of £20,000

NORTH, J.
1890
Ex parte KING'S COLLEGE, CAMBRIDGE.

raised by means of a sale of the India stock in Court, and applied towards paying the cost of the erection of the buildings. The Petitioners had been advised that, under the provisions of the *Lands Clauses Consolidation Act*, 1845, and the *Universities and College Estates* (*Amendment*) *Act*, 1880, the application of the £20,000 towards the erection of the buildings might properly be treated as a permanent investment of that sum; but they desired to replace the amount by thirty equal annual instalments, in order that the same might again become available for the purposes to which it was applicable under the Acts.

The petition asked that the stock might be sold, so as to raise four sums of £5000 respectively on the 15th of January and the 15th of July, 1891, and the 15th of January and the 15th of July, 1892, and that the proceeds of such sale might be paid to the Petitioners, they undertaking to apply the same towards the erection and completion of the additional buildings, and also undertaking to make the yearly payments into Court thereinafter mentioned. The petition also asked that the Petitioners might be at liberty to pay into Court, on the 15th of October, 1893, and on the same day in every subsequent year, up to and including the year 1922, the sum of £666 13*s.* 4*d.*, and that each such sum, when paid in, might be invested in India 3½ per Cent. Stock, the Petitioners undertaking to pay the brokerage.

Cozens-Hardy, Q.C., and *Gaselee*, for the Petitioners:—

The first question is, whether it is necessary to obtain the consent of the Board of Agriculture to the proposed application of the money. This depends upon sect. 27 (1) of the *Universities*

(1) Sect. 27 of the Act of 1858 provides: "It shall be lawful for the said universities, and any college therein respectively . . . from time to time, and at any time hereafter, with the consent of the said Copyhold Commissioners (such consent to be evidenced by an order to be issued under their hands and common seal, in the form or to the effect set forth in the said schedule hereto), to raise by mortgage of any lands belonging to such university or college, for any term of years (determinable as hereafter provided), such sum or sums of money (together with all reasonable costs and expenses incidental to such raising and the application thereof) as shall be certified by the surveyor of the university or college to be properly required, and shall be authorized by the said Commissioners, with

and College Estates Act, 1858, and sects. 2 and 4 of the *Universities and College Estates (Amendment) Act*, 1880. This consent has not yet been applied for, and we submit that it is not required, because the money is not in the hands or under the control of the Board, but is in Court. The result of a different construction of the Acts would be, that the Court could not make an order as to the application of money which is under its own control without the consent of the Board. That could not have been intended. The proposed application of the money might

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interest thereon not exceeding the rate to be specified in such order, and to apply such sum or sums of money for all or any of the purposes following; (that is to say), *inter alia*, for or towards the erection of new or additional houses or buildings, or for the extension and improvement of any existing houses or buildings upon any lands belonging to such university or college."

Sect. 28 provides for the repayment of the money so borrowed by means of equal instalments during a period of thirty years.

Sect. 2 of the Act of 1880 provides:—

"(1.) The purchase-money of land sold by a university or college under the *Universities and College Estates Act*, 1858, or any other Act amending the same, shall, with the consent of the Copyhold Commissioners, be from time to time applicable by the university or college in the repayment of any money borrowed under any of those Acts, or to any of the purposes to which money so borrowed is applicable under those Acts."

"(2.) Where any such purchase-money is so applied, the like provisions shall be made by the university or college for replacing the same as is by sect. 28 of the *Universities and College Estates Act*, 1858, required to be made for the repayment of money borrowed under that Act . . ."

By sect. 4: "The provisions of this Act shall apply as well to moneys which have arisen from any sale, enfranchisement, or exchange of lands belonging to a university or college under and by virtue of the aforesaid Acts, as to moneys belonging solely to any such university or college which may have arisen from the sale, enfranchisement, or exchange of any such lands under any other Act of Parliament, or otherwise howsoever, and which may be now or hereafter standing to the account or credit of any cause or matter in the Supreme Court of Judicature or in Her Majesty's High Court of Justice, or any division thereof, or in the names of trustees nominated in pursuance of any Act of Parliament."

By sect. 48 of the *Settled Land Act*, 1882, the Land Commissioners for England were substituted for the Copyhold Commissioners.

By the *Board of Agriculture Act*, 1889 (52 & 53 Vict. c. 30), a Board of Agriculture was established, and sect. 2 of the Act provided that there should be transferred to the Board the powers and duties of the Land Commissioners for England under (*inter alia*) the *Universities and College Estates Acts* of 1858 and 1880.

NORTH, J. 1890 *Ex parte* KING'S COLLEGE, CAMBRIDGE.

have been treated as a permanent investment under sect. 69 of the *Lands Clauses Consolidation Act*, 1845, and for that purpose the consent of the Board would not have been required. The Petitioners voluntarily offer to replace the money, because it is thought that this mode of procedure will be more advantageous to the college. The sanction of the Court, which is the custodian of the money, is sufficient.

Hornell, for the railway company.

NORTH, J.:—

If I were to hold that the consent of the Board of Agriculture is not required, I should be really reading sect. 4 of the Act of 1880 as if it had said, "the provisions of this Act, except so far as they require that the consent of the Copyhold Commissioners shall be obtained, shall apply, &c." I do not feel myself at liberty to insert those words. I am of opinion that it is necessary to obtain the consent of the Board, and the petition must stand over for the purpose of obtaining their consent.

Solicitors: *F. and T. Smith & Sons; John White.*

W. L. C.

STIRLING, J.

1890

June 24, 25, 26; *July* 1, 2; *Nov.* 4.

BLYTH *v.* FLADGATE.

[1889 B. 803.]

MORGAN *v.* BLYTH.

[1888 M. 3536.]

SMITH *v.* BLYTH.

[1889 S. 1065.]

Solicitor and Client—Retainer implied—Mortgagees and Trustees—Trust Fund, Improper Investment of—Breach of Trust—Negligence of Solicitor—Liability of Partners—Notice—"Actio personalis moritur cum personâ."

Funds, subject to the trusts of a settlement, were invested in Exchequer bills, on the sale of which the proceeds were paid to the account of a firm of solicitors—*F.*, *S.*, and *F.*—at their bankers. The funds were afterwards advanced on a mortgage of house property in a new neighbourhood, and of inadequate value. At that date there were no trustees of the settlement, and the mortgage was taken in the names of *S.* and two other persons who were then proposed, and shortly afterwards appointed new trustees, and never repudiated the transaction. *S.* was the member of his firm who acted for them in all the matters, and for the work which he did the firm, by arrangement, received, at the time when the money was advanced, payment for their bill of costs out of the funds. The mortgage proved to be an insufficient security, and in an action against the trustees it was held that they were jointly and severally liable to make good the loss sustained. The property not having been sold, or the trust funds replaced, beneficiaries sought to make the firm of solicitors liable for the loss of the funds on the ground of negligence, though *S.*'s partners had not had any personal knowledge of the property at the time when the mortgage transaction was completed:—

Held, that in all that *S.* had done in the matter of the mortgage, he acted within the scope of his authority as a partner, that his firm must be taken to have had knowledge that the security was, for trustees, improper, and that, consequently, they were implicated in and jointly and severally liable for the breach of trust; and, further, that the judgment which had been recovered against *S.*, as one of the trustees, had not discharged his partners from liability:

Held also that, though there had not been an express retainer, the relation of solicitor and client might be inferred from the acts of the parties; that it subsisted between the firm and the trustees, and that the firm were liable in damages for the negligence of *S.* for failure in discharge of the duty which had been undertaken to the clients:

Held, also, that the liability extended to the estate of a member of the firm since deceased.

BY a judgment made on the 9th of August, 1888, in an action of *Blyth* v. *Smith*, it was declared that a certain investment of

STIRLING, J. 1890 BLYTH v. FLADGATE. MORGAN v. BLYTH. SMITH v. BLYTH.

trust funds upon mortgage of house property was improper, and a breach of trust, and that the Defendants, Messrs. *Horace William Smith*, *Christopher Hird Morgan*, and *Philip William Blyth*, were jointly and severally liable to make good the funds with all arrears of interest due.

The three actions above mentioned arose out of that investment. They were tried separately, and to an extent on independent evidence; but there were some facts common to all of them. The funds were subject to the trusts of a settlement made on the marriage of Mr. and Mrs. *Blyth*. The settlement was dated the 20th of August, 1855, and was made between *Philip Thomas Blyth* of the first part, *William King* of the second, *Isabella Mary King*, spinster, of the third, and three trustees of the fourth part, viz., *Harry George Gordon*, *Archer Thomas Upton*, and *Philip Patten Blyth*, and they were to hold the trust funds upon trust, with the consent of Mr. and Mrs. *Blyth* during their joint lives, to invest at interest, amongst other things, on real securities in *England* or *Wales*, and from time to time, with the like consent to vary the securities, and to pay the income to Mrs. *Blyth* during her life for her separate use, without power of anticipation, and after her death in trust for the issue of the marriage, as Mr. and Mrs. *Blyth* should, during their joint lives, jointly appoint, and in default of appointment in trust for sons at the age of twenty-one years, and for daughters at that age, or, on marriage, in equal shares.

The marriage took place shortly after the date of the settlement. There were issue of the marriage several children, among others, *Philip William Blyth*, Mrs. *Morgan*, the wife of the Plaintiff (*Christopher Hird Morgan*) in the second action, *Mary Ellen Blyth*, and *Francis Ernest Blyth*. All the original trustees were dead. *Archer Thomas Upton* died on the 5th of January, 1875; *Philip Patten Blyth* on the 30th of January, 1881; and *Harry George Gordon* on the 7th of June, 1883. Part of the trust funds had been invested on a mortgage which was paid off in the lifetime of *Harry George Gordon*, and by his direction the mortgage money was received by Messrs. *Fladgate, Smith, & Fladgate*, a firm of solicitors who had acted for the parties in reference to the mortgage, and which at that time consisted

1890

BLYTH v. FLADGATE.

MORGAN v. BLYTH.

SMITH v. BLYTH.

of *William Mark Fladgate*, *Horace William Smith*, and *William Francis Fladgate*. By the like direction of *Harry George Gordon*, the money when received was temporarily invested in Exchequer bills, which were deposited with Messrs. *Drummond & Co.*, the bankers of the firm of solicitors, in the name of the firm, and they remained so deposited at the time of *Harry George Gordon's* death. After that event Mr. *Philip Thomas Blyth* appeared to have interested himself in looking out for a mortgage suitable for the investment of the trust funds; and on the 8th of October, 1883, he wrote to Mr. *Horace William Smith*, the member of the firm who attended to the affairs of the trust, a letter in which he said that "Mr. *Pocock*, of 5, *Bedford Row*, has proposed to me a security for £11,000, which he says is of ample value, and is put forward on behalf of Mr. *George Searle*, with whom your firm is acquainted. Will you kindly look into this and see whether this money can be safely lent on it?"

After some investigation and two reports of an unfavourable character by Mr. *Sanders*, a surveyor, Mr. *Smith* at first pronounced against the security on three grounds: the depressed state of the property; the large amount of the ground rents; and the inadequate proportion borne by the value of the property to the amount sought to be advanced. Subsequently he reconsidered the matter, and altered his opinion as to the advisability of advancing the money upon the proposed security, his change of view being based not on any new facts, but on the opinion entertained both by Mr. *Philip Thomas Blyth* and himself that Mr. *Sanders* had taken too gloomy a view of the situation. There was a correspondence between Messrs. *Fladgate* and Mr. *Searle* as to the fees which would be payable to the surveyor, and also between Messrs. *Fladgate* and Messrs. *Learoyd & Co.* in reference to title. Ultimately the difficulty as to title was got over, and prior to the 24th of February, 1884, the Exchequer bills were sold, and the proceeds, amounting to the sum of £9658 2*s.* 8*d.*, placed to the credit of Messrs. *Fladgate* at Messrs. *Drummond & Co.'s* bank. During all that time there was no duly-appointed trustee of the settlement. It appeared that on the 9th of November, 1883, Mr. *Smith* called the attention of Mr. *Philip Thomas Blyth* to the subject of the appointment

STIRLING, J. 1890 BLYTH v. FLADGATE. MORGAN v. BLYTH. SMITH v. BLYTH.

of new trustees, and stated that there must be three trustees, and that two of Mr. *Philip Thomas Blyth's* sons should be appointed. On the 18th of January, 1884, Mr. *Smith* was informed that Mr. *Christopher Hird Morgan*, a son-in-law of Mr. *Philip Thomas Blyth*, would be a trustee; Mr. *Philip William Blyth*, a son, would be another; and Mr. *Smith* himself ultimately, but at what date it did not from the evidence clearly appear, became the third. There was some correspondence to the effect that Mr. *Morgan* was perplexed what to do, and that at first he hesitated in reference to being appointed a trustee, but that in the end he consented to be one, and agreed to the proposed investment. On the 13th of March, 1884, Mr. *Searle* executed the mortgage deed to Messrs. *Smith*, *Philip William Blyth*, and *Morgan*, and on the same date the sum of £11,000, partly made up of the trust funds and partly of funds belonging to Mr. and Mrs. *Blyth*, was transferred to his credit in Messrs. *Fladgate's* ledger, and it was applied thus: £1596 9*s.* 10*d.* in payment of a mortgage debt on part of the property; £8997 10*s.* 2*d.* to Mr. *Searle* himself; £21 to Mr. *Sanders*, as his fees for surveying the property; £250, one year's interest in advance, as arranged, to Mrs. *Blyth*; £115 4*s.* 7*d.* was retained by Messrs. *Fladgate* for their costs, and £19 15*s.* 5*d.* remained in their hands. The appointment of Messrs. *Smith*, *Philip William Blyth*, and *Morgan*, as trustees of the settlement, was not executed until the month of April, 1884, after the mortgage deed had been executed, and the trust funds dealt with in the way above mentioned. The security proved to be an insufficient one. No interest beyond the sum of £250 above stated was ever paid on the mortgage debt. In October, 1886, the action of *Blyth* v. *Smith* was commenced by Mrs. *Blyth* (*Mary Ellen Blyth* and *Francis Ernest Blyth* were afterwards added as Plaintiffs) against Messrs. *Smith*, *Philip William Blyth*, and *Morgan*, and the declaration made in it was as stated above, and that the trustees were jointly and severally liable to replace the trust funds with all arrears of interest, and directions were given that the property should be sold. The judgment in that action had not been fully worked out. Some payments on account of interest had since been made to Mrs. *Blyth*, a portion of the property having been sold, but not on

1890

BLYTH v. FLADGATE.

MORGAN v. BLYTH.

SMITH v. BLYTH.

very advantageous terms. On the 1st of May, 1884, the partnership between Mr. *Horace William Smith* and the Messrs. *Fladgate* was dissolved. On the 12th of September, 1888, Mr. *William Mark Fladgate* died, and Mrs. *Helen Louisa Fladgate* (widow), Miss *Maria Frances Fladgate*, and Mr. *William Francis Fladgate* were his legal personal representatives.

The first of the three actions, *Blyth* v. *Fladgate*, was commenced on the 23rd of February, 1889, by Mrs. *Blyth* and her children, Miss *Mary Ellen* and Mr. *Francis Ernest Blyth* (the same Plaintiffs as in the action of *Blyth* v. *Smith*), against Mrs. *Helen Louisa Fladgate*, Miss *Maria Frances Fladgate*, Mr. *William Francis Fladgate*, and Messrs. *Smith*, *Philip William Blyth*, and *Morgan* (the three trustees of the settlement), and by it the Plaintiffs claimed a declaration that the estate of *William Mark Fladgate*, and also the Defendant, *William Francis Fladgate*, personally, were liable to pay the sum of £9658 odd to the Defendants, Messrs *Smith*, *Philip William Blyth*, and *Morgan*, as such trustees. There was no denial in the defence of the Messrs. *Fladgate* of any part of the allegations in reference to the investment of the trust funds; and in the view of the Court it was therefore taken to be admitted by them that the Exchequer bills were in the custody of the firm; that all the partners knew or were affected with knowledge that the bills formed part of the funds, subject to the trusts of the settlement; that the bills were sold by order of the firm, and that the proceeds were placed to the account of the firm at their bankers. It was agreed that the written evidence, and the shorthand writer's transcript of notes of the *vivâ voce* evidence in the action of *Blyth* v. *Smith*, and all the documents which had been put in in that action, should be admitted in this action.

Further facts appear in the judgment, in which the correspondence and evidence are referred to.

Hastings, Q.C., and *R. C. Dobbs*, for the Plaintiffs:—

It may be suggested that the *Trustee Act*, 1888 (51 & 52 Vict. c. 59), s. 4, sub-s. 1, applies to this case; but it is submitted that it does not, as this is not a case of trustees only lending more than they should have done upon the security of the

STIRLING, J. 1890 BLYTH v. FLADGATE. MORGAN v. BLYTH. SMITH v. BLYTH.

property, but a case in which the security was altogether an improper one. The evidence proves clearly, that the firm of solicitors received the trust funds into their hands; and they have not shewn that they acquitted themselves of the duty which they undertook in regard to the funds. They made themselves trustees *de son tort* of the funds, and did not apply them in accordance with the trusts of the settlement of which they had full knowledge; therefore they should be held liable as trustees to make good the sum claimed.

When trust moneys get into the hands of persons who, knowing the trusts, allow such moneys to be improperly dealt with, they are accountable for the loss sustained: *Morgan* v. *Stephens* (1).

Beale, Q.C., and *L. H. Jenkins*, for the Defendant *Morgan*, supported the Plaintiffs' contention.

Crackanthorpe, Q.C., and *Farwell*, for the legal personal representatives of Mr. *William Mark Fladgate*:—

The wrongdoer in this case was Mr. *Horace William Smith*, for the Messrs. *Fladgate* took no part in the mortgage transaction. They knew nothing of the properties or of their values. The moneys were received for the purpose of investment. The solicitors were acting as scriveners, which is outside the proper business of solicitors. The partners of Mr. *Smith* were not affected with notice of the trusts through what he did in regard to the investment, and therefore they are not responsible: *Lindley* on Partnership (2).

In *Blair* v. *Bromley* (3) solicitors were held severally liable; but the plaintiffs in that case were their clients; while in this case the Messrs. *Fladgate* were never retained as solicitors by the Plaintiffs.

In *Morgan* v. *Stephens* the solicitor had knowingly allowed the executrix, who was entitled to the income only, to get possession of the capital, and to misapply it, and he was held liable, but that decision does not apply to this case. An agent of a trustee ought not to be made responsible as a constructive

(1) 3 Giff. 226.
(2) 5th Ed. p. 142.
(3) 5 Hare, 542; 2 Ph. 354.

trustee, unless some of the trust funds came to his hands, or it can be shewn that he was a party to a dishonest act by the trustee: *Barnes* v. *Addy* (1); *Harries* v. *Rees* (2).

[STIRLING, J.:—The trust funds were, in fact, paid to the account of the firm at their bankers, and upon it all the partners could draw. Did not that impose upon the firm the obligation of shewing that they have properly discharged themselves of it? *Lindley* on Partnership (3).]

The liability, if any, was joint, and judgment has already been obtained against Mr. *Smith* in respect of it in *Blyth* v. *Smith*. That is a bar to an action against the other persons alleged to be liable: *Kendall* v. *Hamilton* (4); *Ex parte Adamson* (5); *Cheetham* v. *Ward* (6); *Nicholson* v. *Revill* (7); *Co. Litt.* (8); *Beckett* v. *Ramsdale* (9); *Serrao* v. *Noel* (10); *Cambefort* v. *Chapman* (11).

H. A. Giffard, Q.C., and *Archibald Cass*, for the Defendant, Mr. *Horace William Smith*:—

In the action of *Blyth* v. *Smith*, Mr. *Smith* has, as one of the trustees, already been declared liable in respect of the trust funds, so that practically this action does not concern him.

Hastings, in reply:—

Knowledge of Mr. *Smith's* transactions with the trust funds must be imputed to his partners, as the firm were acting as solicitors for the mortgagees of whom Mr. *Smith* was one, and further, the mortgagor himself paid the firm their bill of costs. They in fact made themselves trustees, and therefore the liability is not joint, but joint and several. *Kendall* v. *Hamilton* and other cases of that class do not apply here. Moreover, the judgment in *Blyth* v. *Smith* was given against Mr. *Smith* in his capacity of trustee, and not in that of solicitor. He is in law a different

(1) Law Rep. 9 Ch. 244.
(2) 37 L. J. (Ch.) 102.
(3) 5th Ed. p. 150.
(4) 4 App. Cas. 504.
(5) 8 Ch. D. 807.
(6) 1 Bos. & P. 630.
(7) 4 Ad. & E. 675.
(8) Ed. 1832, p. 232 a.
(9) 31 Ch. D. 177.
(10) 15 Q. B. D. 549.
(11) 19 Q. B. D. 229.

STIRLING, J. 1890 BLYTH v. FLADGATE. MORGAN v. BLYTH. SMITH v. BLYTH.

person in his two capacities; and the judgment which was obtained against him as trustee did not release his partners from liability for their acts as solicitors: *In re Davison* (1). [The cases of *Blackwood* v. *Borrowes* (2), and *In re Blundell* (3), were also referred to.]

STIRLING, J.:—

I think it will be more convenient that I should not give judgment in this case until after I have heard the arguments in the other actions of *Morgan* v. *Blyth* and *Smith* v. *Blyth*, which have arisen out of the same transactions.

MORGAN *v.* BLYTH.

This was an action of a different kind. It was brought on the 9th of November, 1888, by *Christopher Hird Morgan*, one of the three trustees, against *Philip William Blyth*, *William Francis Fladgate*, and *Horace William Smith*, and by it the Plaintiff claimed, as trustee of the settlement, a declaration that the Defendants, Messrs. *Fladgate* and *Smith*, were jointly and severally liable to replace the sum of £9658 odd, being a part of the funds comprised in the settlement; also that they should indemnify the trust estate against all liabilities in respect of the investment, and, if necessary, the execution by the Court of the trusts of the settlement; and further, the Plaintiff in his personal capacity claimed to have from the same Defendants an indemnity against all liabilities in respect of the investment; damages against the same Defendants for injury by their negligence as solicitors of the Plaintiff; and also a declaration that the Plaintiff was entitled to be recouped out of the share of the Defendant, *Philip William Blyth*, under the settlement, for any sum which he might now or thereafter be called upon to pay in replacing the sum of £9658 odd; or in respect of costs in the action of *Blyth* v. *Smith*; and that the Plaintiff was entitled to a lien on such share of the Defendant *Blyth* for such sum. The main defence of the Defendant *William Francis Fladgate* to the allegations made by the Plaintiff was, that the relation of solicitor and client never sub-

(1) 13 Q. B. D. 50. (2) 4 D. & War. 441.
(3) 40 Ch. D. 370.

sisted between the Plaintiff *Morgan* and the firm of *Fladgate, Smith, & Fladgate.*

STIRLING, J.

1890

BLYTH v. FLADGATE.

MORGAN v. BLYTH.

SMITH v. BLYTH.

Beale, Q.C., and *L. H. Jenkins*, for the Plaintiff:—

Mr. *Morgan* relied upon Mr. *Smith*, who acted as solicitor for the three trustees, to find a good and safe investment of the trust funds. He was negligent in his duty as solicitor, and he and his partners are primarily liable for the loss which has been sustained: *Bahin* v. *Hughes* (1); *Re Partington* (2); *Sawyer* v. *Goodwin* (3). There may not have been any express retainer of Mr. *Smith's* firm as solicitors for the trusts; but there was an agreement between the parties that the firm should act in that capacity, which was equivalent to a retainer, and the firm having received the trust funds and placed them upon an improper security are bound to replace them as if they were still in their hands: *Bean* v. *Wade* (4); *Craig* v. *Watson* (5); *Blair* v. *Bromley* (6); *Morgan* v. *Stephens* (7); *Sawyer* v. *Goodwin* (8). Messrs. *Fladgate* made their charges for carrying out the mortgage business according to the scale allowed by the *Solicitors' Remuneration Act*, and that shewed clearly that they accepted the position of solicitors to the mortgagees, though their bill of costs was paid by the mortgagor. Any person who takes part in dealing with the property of others is bound to act in a prudent and reasonable manner, although he may be acting under a contract, and be liable on the contract: *Pollock* on Torts (9). Irrespective of his being the solicitor, Mr. *Smith* is liable, as he represented to his co-trustees that the money was properly invested, and he must make good that representation, and put them in the position in which they would have been if the representation had been true: *Lockhart* v. *Reilly* (10); *Burrowes* v. *Lock* (11); *Cann* v. *Willson* (12). The Plaintiff is entitled to be recouped what he may have to pay in replacing the trust funds out of Mr. *Philip William Blyth's* share: *Raby* v. *Ridehalgh* (13).

(1) 31 Ch. D. 390.
(2) 57 L. T. (N.S.) 654.
(3) 36 L. J. (Ch.) 578.
(4) 1 Times L. R. 404; 2 Times L. R. 157.
(5) 8 Beav. 427.
(6) 5 Hare, 542; 2 Ph. 254.
(7) 3 Giff. 226.
(8) 1 Ch. D. 351.
(9) 2nd Ed. pp. 374, 375.
(10) On appeal, 1 De G. & J. 464.
(11) 10 Ves. 470.
(12) 39 Ch. D. 39.
(13) 7 D. M. & G. 104.

STIRLING, J. 1890 BLYTH v. FLADGATE. MORGAN v. BLYTH. SMITH v. BLYTH.

R. C. Dobbs (*Hastings*, Q.C., with him), for the Defendant *Philip William Blyth*:—

The *cestuis que trust* in the case of *Raby* v. *Ridehalgh* (1) had instigated the trustees to commit a breach of trust; but here the Defendant *Philip William Blyth* simply acquiesced in making the investment, and did not suggest it. In *Raby* v. *Ridehalgh* the *cestuis que trust* were ordered to replace the funds from which they had derived a benefit by the breach of trust; but *Philip William Blyth* has received no benefit, and consequently there are no funds to replace.

Crackanthorpe, Q.C., and *Farwell*, for the Defendant, *William Francis Fladgate*:—

The firm were not the solicitors of the Plaintiff, their client really being Mr. *Philip Thomas Blyth*, who first suggested the investment to Mr. *Smith*. The Plaintiff has not yet paid anything under the judgment made against the trustees, so that his action is a *quia timet* action which he cannot maintain: *Hughes-Hallett* v. *Indian Mammoth Gold Mines Company* (2).

[STIRLING, J.:—A trustee is entitled to indemnity against loss sustained by him otherwise than by his own default in the execution of his trust: *Lindley* on Partnership (3). A judgment has been given against the three trustees, and that is very different from a case, like the one just cited, where the loss had not occurred.]

A firm is not liable for the misrepresentation made by one of the partners unless it was fraudulent: *Lindley* on Partnership (4). No fraud has been proved against Mr. *Smith*. The cases which have been referred to do not apply here. The trust funds cannot be treated as being still in the firm's hands, or as if they had been invested upon an utterly unauthorized security. They were placed upon a mortgage of a proper class with Mr. *Morgan's* consent. A loss is alleged to have occurred; but, if so, it was owing to an error of judgment only, and Mr. *William Francis Fladgate* should not be made liable.

(1) 7 D. M. & G. 104.
(2) 22 Ch. D. 561.
(3) 5th Ed. pp. 373, 374.
(4) Ibid. pp. 162, 163.

H. A. Giffard, Q.C., and *Archibald Cass*, for the Defendant, *Horace William Smith*:—

STIRLING, J.
1890
BLYTH v. FLADGATE.
MORGAN v. BLYTH.
SMITH v. BLYTH.

There was no relation of solicitor and client established between Mr. *Morgan* and Mr. *Smith*. To be liable as a solicitor trustee, as the defendant in *Re Partington* (1) was held to be, there must be a right to charge for profit costs against the trust funds, and Mr. *Smith* was never in that position. He was not entrusted with the management of the trust funds, and never undertook to find a proper investment for them. Further, at the date of the transaction the firm were not in any sense trustees. Mr. *Smith* and Messrs. *Blyth* and *Morgan* became mortgagees, and some time afterwards trustees, and everything which had been done was ratified by them. Neither in regard to the trusts, the liability as to which has already been inquired into, nor upon any personal ground, can Mr. *Morgan* be permitted to call upon Mr. *Smith* to make good anything. A trustee in *Lockhart* v. *Reilly* (2) and in *Thompson* v. *Finch* (3), was held entitled to indemnity against his solicitor co-trustee because he had been misled by him; but that is not the case here. It is not within the ordinary business of a solicitor to receive money and find an investment for it: *Harman* v. *Johnson* (4); *Plumer* v. *Gregory* (5). A solicitor may accept the duty on a special retainer; but there was no retainer in this case. Mr. *Smith* cannot, therefore, be made liable for any loss on the ground of negligence as a solicitor. A solicitor who acts for trustees is solicitor to them personally, and not to the trust estate: *Staniar* v. *Evans* (6). When Mr. *Smith* undertook the conduct of the business there were no trustees of the settlement, and those who were subsequently appointed and afterwards adopted what he had done cannot make him liable to them: *Kelner* v. *Baxter* (7); *In re Northumberland Avenue Hotel Company* (8); *In re Empress Engineering Company* (9); *Wilson* v. *Tumman* (10). Mr. *Smith* has paid income to Mrs. *Blyth*, and has made other payments, and Messrs. *Morgan* and

(1) 57 L. T. (N.S.) 654.
(2) 1 De G. & J. 464.
(3) 8 D. M. & G. 560.
(4) 2 E. & B. 61.
(5) Law Rep. 18 Eq. 621.
(6) 34 Ch. D. 470.
(7) Law Rep. 2 C. P. 174, 184.
(8) 33 Ch. D. 16.
(9) 16 Ch. D. 125.
(10) 6 Man. & G. 236.

STIRLING, J. 1890 BLYTH v. FLADGATE. MORGAN v. BLYTH. SMITH v. BLYTH.

Philip William Blyth have not paid anything. There should be an inquiry of how much has been paid by Mr. *Smith*. The liability and loss should not all be thrown upon him, as one trustee, but there should be contribution.

L. H. Jenkins, in reply:—

If Mr. *Morgan* was a party to a breach of trust, still that did not preclude him from suing those who were guilty of the breach: *Baynard* v. *Woolley* (1). The firm represented to Mr. *Morgan* that they could advance the trust funds upon a sufficient security if it was approved of, and even if the firm were solicitors for Mr. *Philip Thomas Blyth* they are equally responsible for their acts. They said that they were not solicitors for Mr. *Morgan* because he never paid any costs; but Mr. *Philip Thomas Blyth* never paid any, and yet they said that they were solicitors for him. The fact that the costs were paid by the mortgagor did not make the firm any the less the solicitors of the trustees: *Young* v. *Wallingford* (2). It is the usual practice for mortgagors to pay mortgagee's costs: *Thompson* v. *Finch* (3); *Re Partington* (4).

[STIRLING, J., referred to *Butler* v. *Butler* (5); and *Crackanthorpe*, Q.C., to *Bahin* v. *Hughes* (6).]

Mr. *Smith* has made certain admissions, and admissions by a partner, even if made after the dissolution of partnership, as to matters which occurred during the partnership may be used against the firm: *Wood* v. *Braddick* (7). Not only are the admissions good against Mr. *Smith*, but good against the firm: *Pritchard* v. *Draper* (8). At any rate they are good against Mr. *Smith*: *Sharland* v. *Mildon* (9). Whether the firm were solicitors or not, or trustees or not, Mr. *Morgan* is entitled to recover that which he is entitled to in an action for negligence: *Howell* v. *Young* (10); and he is entitled to recover more than the sum actually expended. His right against the Messrs. *Fladgate* is for the wrong committed against him at the time

(1) 20 Beav. 583.
(2) 52 L. J. (Ch.) 590, 592.
(3) 8 D. M. & G. 560.
(4) 57 L. T. (N.S.) 654.
(5) 7 Ch. D. 116.
(6) 31 Ch. D. 390.
(7) 1 Taunt. 104.
(8) 1 Russ. & My. 191.
(9) 5 Hare, 469.
(10) 5 B. & C. 259.

of the investment, and the *Statute of Limitations* does not apply. The measure of the damage sustained by Mr. *Morgan* is the loss he has incurred or is likely to incur by reason of the negligence: *Maine* on Damages (1); *Howell* v. *Young* (2); *Sawyer* v. *Goodwin* (3); *Lockhart* v. *Reilly* (4).

The question is not, as has been suggested, *res judicata* against the Messrs. *Fladgate* even if at all, as this is not the same complaint. The cases cited of *Kelner* v. *Baxter* (5) and others have no reference to this case, as here the work was done. A trustee who commits a breach of trust with the approbation of his *cestui que trust* is entitled to be indemnified out of the estate of the person who consented to such breach: *Trafford* v. *Boehm* (6).

SMITH *v.* BLYTH.

The third action was brought by Mr. *Horace W. Smith* against his co-trustee, Mr. *Philip William Blyth*, for contribution. It was met by a counter-claim on the part of Mr. *Blyth* against Mr. *Smith*, Mr. *William F. Fladgate*, and the legal personal representatives of Mr. *William Mark Fladgate*, alleging that the firm of Messrs. *Fladgate, Smith, & Fladgate* acted as solicitors for the mortgagees, and were guilty of negligence, and seeking relief upon that footing.

H. A. Giffard, Q.C., and *Archibald Cass*, for the Plaintiff:—

Mr. *Smith* has already made payments out of his own pocket to Mrs. *Blyth* of interest in satisfaction of the judgment given in *Blyth* v. *Smith*, and he may have to make more payments to her. Mr. *Philip William Blyth* as trustee has paid nothing; therefore Mr. *Smith* is entitled to contribution from him.

Hastings, Q.C., and *R. C. Dobbs*, for Mr. *Philip William Blyth* in the action and counter-claim:—

Mr. *Smith* has no right to any contribution; at all events, not before the mortgage security has been realized; and then Mr. *Smith*, who has been just as much in fault as Mr. *Blyth*, must

(1) 4th Ed. pp. 441, 442.
(2) 5 B. & C. 259.
(3) 36 L. J. (Ch.) 578.
(4) 25 L. J. (Ch.) 697; 27 L. J. (Ch.) 54.
(5) Law Rep. 2 C. P. 174.
(6) 3 Atk. 440, 444.

STIRLING, J. 1890 BLYTH v. FLADGATE. MORGAN v. BLYTH. SMITH v. BLYTH.

establish that Mr. *Blyth* has done wrong, and that he has benefited by it. No trustee, either Mr. *Smith* or Mr. *Morgan*, has any right against Mr. *Blyth's* estate for contribution or recoupment. As a trustee Mr. *Blyth* has already been made liable, and as a *cestui que trust* he is under no obligation. No residue has yet been established. The Plaintiff is not entitled to any relief on his statement of claim: *Priddy* v. *Rose* (1); *Raby* v. *Ridehalgh* (2); *Howell* v. *Young* (3).

The arguments upon the counter-claim were substantially the same as they were in the action of *Morgan* v. *Blyth*.

H. A. Giffard, Q.C., and *Cass*, were for Mr. *Smith*.

Crackanthorpe, Q.C., and *Farwell*, for Mr. *William F. Fladgate* and the legal personal representatives of Mr. *William Mark Fladgate*, deceased.

H. A. Giffard, in reply, in the action of *Smith* v. *Blyth*; and

Hastings, in reply on the counter-claim.

1890. Nov. 4. STIRLING, J.:—

These actions arise out of an investment on mortgage of funds subject to the trusts of a settlement made on the marriage of Mr. and Mrs. *Blyth*, which was held by me in a previous action of *Blyth* v. *Smith* to be a breach of trust. These three actions were tried separately, and to a certain extent on independent evidence; but there are some facts which are common to all of them, and these I proceed to state.

[His Lordship then stated the facts, and continued:—]

It thus appears that Mr. *Smith* pronounced against the security on three grounds: first, the depressed state of the property; secondly, the large amount of ground rents; and thirdly, the inadequate proportion borne by the value of the property to the amount sought to be advanced, and in my opinion every one of those objections was well founded. [His Lordship then stated further facts, referred to the correspondence and evidence, and

(1) 3 Mer. 86. (2) 7 D. M. & G. 104, 109.
(3) 5 B. & C. 259.

after reading two paragraphs from the statement of claim and the defence in *Blyth* v. *Smith*, continued:—] The defence of the Messrs. *Fladgate* contained no denial of any part of the allegations made by the statement of claim as to the investment, and regard being had to the admissions in the defence, it must be taken to be admitted by them—first, that the Exchequer bills were in the custody of the firm; secondly, that all the partners knew, or were affected with knowledge that those bills formed part of the funds subject to the trusts of the settlement; and thirdly, that the bills were sold by order of the firm, and that the proceeds were placed to the account of the firm at their bankers. The funds, therefore, came into the custody and under the control of the firm with notice of the trusts upon which they were held; and as against the Plaintiffs in *Blyth* v. *Fladgate*, it lay with the firm to discharge themselves by shewing that the funds were duly applied in accordance with the trusts. That the Messrs. *Fladgate* attempted to do by saying that the funds were paid over to Mr. *Searle* by direction of the trustees of the settlement, on the security of mortgages of real estate, a mode of investment which was within the powers of the trustees, and of the impropriety of which they had no notice. It is to be observed that at the date of the payment to Mr. *Searle*, Messrs. *Smith*, *Philip William Blyth*, and *Morgan* had not been appointed trustees, and neither the investment of the funds in their names nor the application of them by their direction could, in the first instance, be a discharge to the firm. Messrs. *Smith*, *Philip William Blyth*, and *Morgan* were however shortly afterwards appointed trustees, and never repudiated the transaction, or disclaimed any interest under the mortgage deed; and under these circumstances it was contended, and I think rightly, that they must be treated as having sanctioned the application of the funds.

That sanction, however, would not avail the partners in the firm of Messrs. *Fladgate, Smith, & Fladgate* if they had knowledge or notice that the investment was one which could not properly be made by duly-constituted trustees. It was admitted that neither Mr. *William Mark Fladgate* nor Mr. *William Francis Fladgate* had any actual knowledge of the nature of the security taken for the advance made to Mr. *Searle*; but it was contended that each

STIRLING, J. 1890 BLYTH v. FLADGATE. MORGAN v. BLYTH. SMITH v. BLYTH.

of them was affected with notice through their partner Mr. *Smith*, to whom the whole of the facts were known. This point requires careful consideration. As I have already said, the matter was brought before Mr. *Smith* by Mr. *Philip Thomas Blyth*, who by his letter of the 8th of October, 1883, asked Mr. *Smith* to "look into this, and see whether this money can be safely lent on it." That letter was addressed to Mr. *Smith* as a member of the firm of Messrs. *Fladgate, Smith, & Fladgate*, and it is clear from the contemporaneous letter of Mr. *Pocock* that the advance was to be made by trustees, and consequently that what Mr. *Smith* was asked to do was to advise whether the security was a safe one for trustees—a matter which falls within the scope of a solicitor's ordinary duties. Mr. *Smith*, as a member of the firm, proceeded to investigate the nature of the security, and ultimately placed himself in communication with Mr. *Searle's* solicitor, received and perused the abstracts of title, made requisitions thereon, and prepared the securities (which were made to himself, Mr. *Philip William Blyth*, and Mr. *Morgan*, the intended new trustees of the settlement), and saw to the due execution of them by the mortgagor. In all that he was acting within the scope of his authority as a partner in the firm of Messrs. *Fladgate, Smith, & Fladgate*, and for the work done by Mr. *Smith*, as such partner, the firm received payment by deducting, in pursuance of an agreement made with Mr. *Searle*, the mortgagor, the sum of £115 14*s.* 7*d.* from the money advanced to Mr. *Searle*, which passed through their hands. Mr. *Smith*, therefore, while acting as a member of the firm, became acquainted with the nature of the security on which the money under the control of the firm and known by the firm to be a trust fund, was advanced; and the knowledge so acquired by Mr. *Smith* must, as it seems to me, be imputed to the other partners, whose agent he was, for the purpose of dealing with this trust fund under their control. I think, therefore, that the other partners must be taken to have had notice that the security was not of a character suitable for the investment of trust funds, and was one which the trustees of the settlement could not properly sanction as an investment of the funds in the custody of the firm. The partners were consequently implicated in the breach of trust which was committed.

It was contended, on behalf of the partners, that the liability was a joint liability only, and that, as judgment had been recovered in *Blyth* v. *Smith* against their co-partner, Mr. *Smith*, they were discharged, and the case of *Kendall* v. *Hamilton* (1) was referred to. To that the answer is, that the liability arising out of a breach of trust is not joint merely, but joint and several: *Wilson* v. *Moore* (2). It was, however, said that, even if that were so, the judgment against Mr. *Smith* operated as a discharge of the joint and several liability on the principle laid down in *Cheetham* v. *Ward* (3), and *Nicholson* v. *Revill* (4). That principle, however, does not apply to the case of a judgment recovered against one of several joint and several debtors. The law is thus stated by Mr. Baron *Bayley* in the case of *Lechmere* v. *Fletcher* (5): "There are many cases in the books as to joint and several bonds, from which it appears, that, though you have entered judgment on a joint and several bond against one obligor, you are still at liberty to sue the other; unless indeed the judgment has been satisfied; but so long as any part of the demand remains due, you are at liberty to sue the other, notwithstanding you have obtained judgment against one. This, I think, establishes the principle, that where there is a joint obligation, and a separate one also, you do not, by recovering judgment against one, preclude yourself from suing the other."

That statement of the law was recognised by Mr. Baron *Parke* in *King* v. *Hoare* (6).

Lastly, the Defendants claimed the benefit of the *Trustee Act*, 1888 (51 & 52 Vict. c. 59), s. 4, sub-s. 1, which enacted that "no trustee lending money upon the security of any property shall be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of such property at the time when the loan was made."

To that the answer is, that the trustees were not charged with a breach of trust "by reason only of the proportion borne by the amount of the loan to the value of such property at the time when the loan was made." They were so charged because the

(1) 4 App. Cas. 504.
(2) 1 My. & K. 126, 337.
(3) 1 Bos. & P. 630.
(4) 4 Ad. & E. 675.
(5) 1 C. & M. 623, 635.
(6) 13 M. & W. 494, 505.

STIRLING, J. 1890 BLYTH v. FLADGATE. MORGAN v. BLYTH. SMITH v. BLYTH.

security was, in the language of Lord *Watson* in the case of *Learoyd* v. *Whiteley* (1), one of a "class which is attended with hazard." The property was situate in a new neighbourhood, and its future was uncertain. The mortgagor himself admitted that it was "under a cloud"; many of the houses were unlet, and there was a heavy ground rent payable; and, as Mr. *Smith* pointed out, it was possible that the rents might be insufficient to keep down the accruing interest. In the action of *Blyth* v. *Smith* the defendant, Mr. *Smith*, admitted on his cross-examination that, apart from its deficiency in value, he was satisfied that it was not a first-class security, or a desirable one for trustees. In my opinion, Mr. *William Francis Fladgate*, and the estate of Mr. *William Mark Fladgate*, are severally liable to make good the loss occasioned by the investment of the trust funds on such an improper security, and the judgment will contain a declaration to that effect. As regards the rest, I feel that the case is in some respects a hard one, and I am willing that the order should be framed so as to press as lightly as may be upon the Defendants; but two years have elapsed since the judgment was given in *Blyth* v. *Smith*, and it seems to me that the property comprised in the mortgage ought to be at once realized, and the deficiency be made good, and that an order for that purpose should be made. As regards the costs, I thought the circumstances were such that the defendants to the action of *Blyth* v. *Smith*, of whom Mr. *Smith* was one, ought not to be fixed with them. If I was right in coming to that conclusion, and I still think I was, then it seems to me that I ought not in this action to hold Mr. *Smith's* more innocent partners liable for costs. I therefore propose to make no order as to the costs of this action, but to direct that the Plaintiffs shall be at liberty to apply in the action of *Blyth* v. *Smith* for payment of their costs out of the trust funds when replaced. If the legal personal representatives of Mr. *William Mark Fladgate* do not admit assets, there must be the usual order for administration of their testator's estate.

The second action of *Morgan* v. *Blyth* is of a different kind. It was brought in November, 1888, by Mr. *Christopher Hird Morgan*, one of the three trustees, against Mr. *Philip William*

(1) 12 App. Cas. 727, 733.

Blyth, Mr. *William Francis Fladgate*, and Mr. *Horace William Smith*, and claimed certain declarations against the Defendants. [His Lordship referred to the pleadings, and continued:—] The main question raised by the pleadings is, whether the relation of solicitor and client subsisted between the Plaintiff, Mr. *Morgan*, and the firm of Messrs. *Fladgate, Smith, & Fladgate*. It is quite plain that no formal or express retainer was ever given by him to them; but that was not necessary, for although no such express retainer has been given, the relation may subsist, and its existence may be inferred from the acts of the parties. If any authority for that proposition be required, it will be sufficient to refer to the decision of the Court of Appeal in the case of *Bean* v. *Wade* (1). It was agreed between the parties that the evidence adduced in the case of *Blyth* v. *Smith* should be also used in this action, and accordingly in this action no witness was examined *viva voce*. In dealing with the question to which I have just referred, I think it will be best to commence by referring to the evidence of Mr. *Smith*, the only member of the firm of Messrs. *Fladgate* who was called. I may remark in the first place that he distinctly stated in his examination in chief that whatever he did, as solicitor, with reference to the investment of the trust funds, he did as a partner in the firm of Messrs. *Fladgate & Co.* The matter was first brought before him on the 8th of October, 1883, by Mr. *Philip Thomas Blyth*, by the letter which I have already read. It appears to me quite plain that what Mr. *Smith* was asked to do was to advise whether the proposed advance was one which trustees could properly make, and it was to that question that he directed his attention. The contemporary entry made by Mr. *Smith* in his journal was under the heading, "*P. T. Blyth's* Trustees," and under the like heading all subsequent entries relating to the advance were placed. They include one referring to an interview between Mr. *Smith* and Mr. *Morgan* on the 7th of March, 1884, in these terms: "Attending Mr. *Morgan*, giving him full information as to the nature of the security; and he wished to have twenty-four hours' notice to consider the matter, and proposed to give us his decision by Monday morning." Now, until after the advance was made, there were no

(1) 2 Times L. R. 157.

STIRLING, J. 1890 BLYTH v. FLADGATE. MORGAN v. BLYTH. SMITH v. BLYTH.

trustees such as were referred to in those entries. In his examination in chief Mr. *Smith* was asked: "On whose retainer, and by whose instructions, were you acting throughout?" and he said, "The person I looked to for instructions was Mr. *Philip Thomas Blyth*." "Did your firm receive instructions from any one else in the matter of the sale and investment?" And to that question he replied "No." It is not, to my mind, insignificant that Mr. *Smith* avoided saying on whose retainer he acted. At the same time it is right to say that, in some of his letters, written between the 24th of October and the 6th of December, 1883, he plainly refers to Mr. *Philip Thomas Blyth* as his client in the matter. On the other hand, in letters of the 30th of November, 1883, and of the 16th of January, 1884, the latter written after he had called Mr. *Philip Thomas Blyth's* attention to the necessity of appointing new trustees of the settlement, Mr. *Smith* refers to "clients" in the plural. There can be no doubt that it was on behalf of the mortgagees that Messrs. *Fladgate* purported to act. The mortgagor was represented by separate solicitors. It was made a term of the advance that the fees of Messrs. *Fladgate, Smith, & Fladgate* should, in accordance with a very prevalent custom, be deducted from the advance. Those fees were due to Messrs. *Fladgate* for work done on behalf of the mortgagees, and in respect of them a deduction was made from the sum advanced to the mortgagor. Further, care was taken, as is shewn by the correspondence, to avoid as far as possible the necessity of recourse for payment to any person on whose behalf Messrs. *Fladgate* could be supposed to be acting. From this portion of the evidence I come to the conclusion that the matter was in the first instance taken up by Mr. *Smith* and his firm without any proper authority or retainer, in the expectation that his and their acts would be taken advantage of by persons clothed with due authority to deal with the funds proposed to be invested, and that their services would be rewarded by a payment either out of the advance, in accordance with the usual custom, or, if necessary, out of the trust funds. I must now turn to the evidence of Mr. *Morgan*, the Plaintiff in this action, on which the Defendants' counsel most properly placed great reliance. In his examination in chief he was asked:

"Messrs. *Fladgate, Smith, & Fladgate* acted as your solicitors in the matter of your marriage settlement?"—"They did." "In any other matter?"—"No." "Did you give any direct instructions to Messrs. *Fladgate* or to Mr. *Smith* other than such instructions, if any, as are contained in the letter of the 10th of March, 1884?"—"No." In his cross-examination he was asked: "When you said in that letter, 'rely on him,' did you mean on him personally, or upon the firm of Messrs. *Fladgate & Co.*?"—"Upon the firm generally—those who were employed to decide." "Did you consider that the firm were acting as solicitors for you, as one of the trustees?"—"No." "Did not Messrs. *Fladgate, Smith, & Fladgate* act as your solicitors in carrying out the mortgage?"—"I left the matter entirely to them." "They carried it out as your solicitors?"—"No, not as my solicitors. I left the thing alone directly I settled to become a trustee." He was then referred to statements which he had made in his answers to the interrogatories delivered in the action, and was asked whether they were true, and he said: "I never authorized them to act as my solicitors; it" (*i.e.* the answer) "was drawn by Mr. *Smith*." Being pressed further, he said: "I never gave them authority to act for me; and when I left the letter with Mr. *Smith*, saying I would become a trustee, I had nothing more to do with it." "Did you not authorize Mr. *Smith*, as a member of the firm, to complete the mortgage?"—"I was asked to become a trustee, and I said I would. I never authorized Mr. *Smith*, or anybody else. I wrote to Mr. *Smith* saying that I would become a trustee." "You knew quite well that, if you consented to become a trustee the advance would be made out of the trust funds?"—"Yes." I asked: "Did you not intend to authorize them, by accepting the trusteeship, to carry out the advance, and have the mortgage made in your name as well as the other two gentlemen?"—"I suppose I did. I never thought anything more of it after I wrote the letter." It is to be remembered that when that evidence was given, Mr. *Morgan* was disputing his liability to the *cestuis que trust* in respect of the trust funds—a point which has been decided against him. I think that his denials of authority given to Mr. *Smith* and the Messrs. *Fladgate* to act for him should not be pressed too far. He certainly never

STIRLING, J. 1890 BLYTH v. FLADGATE. MORGAN v. BLYTH. SMITH v. BLYTH.

gave them any express authority; but it still remains to be considered what obligations arise. Now, Mr. *Morgan* knew that Messrs. *Fladgate* had been acting with reference to the proposed mortgage, and that, as he said, "The mortgage and everything were all prepared before I gave my consent at all—they were only waiting for my signature and consent to become a trustee." No man of business, no sensible man, could suppose that Messrs. *Fladgate's* services were given gratuitously. It was with that knowledge that Mr. *Morgan* consented to become a trustee, and authorized the mortgage to be carried out. Now the law as to implied obligations was discussed by Lord Justice *Bowen* in the case of *Falcke* v. *Scottish Imperial Insurance Company* (1), and during the argument (2) his Lordship referred to the law as laid down in *Smith's* Leading Cases, in the notes to *Lampleigh* v. *Brathwait* (3): that if a party adopts and enjoys the benefit of what has been done by another person, his request that it should be done will be presumed, and said that that seemed to be stated too widely. In his judgment he said (4): "With regard to ordinary goods upon which labour or money is expended with a view of saving them or benefiting the owner, there can, as it seems to me, according to the common law be only one principle upon which a claim for repayment can be based, and that is where you can find facts from which the law will imply a contract to repay or to give a lien. It is perfectly true that the inference of an understanding between the parties—which you may translate into other language by calling it an implied contract—is an inference which will unhesitatingly be drawn in cases where the circumstances plainly lead to the conclusion that the owner of the saved property knew that the other party was laying out his money in the expectation of being repaid. In other words, you must have circumstances from which the proper inference is that there was a request to perform the service." That was a case which related to the payment of a premium on a policy by a person not liable to pay it. But the observations of Lord Justice *Bowen* seem to apply to a case like the present; and the question is, whether the Court can come to the conclusion that there was an implied contract on

(1) 34 Ch. D. 234.
(2) Ibid. 239.
(3) 1 Smith's L. C. 8th Ed. pp. 151–158.
(4) 34 Ch. D. 249.

the part of Mr. *Morgan* that Messrs. *Fladgate* should be paid for the work done by them. In my opinion the facts here justify the inference that there was an implied contract on the part of Mr. *Morgan* that Messrs. *Fladgate* should be paid. It is not necessary, as I think, that the contract should be for payment by him personally. A trustee or executor may retain a solicitor upon the terms that he is to look for payment only to the estate, or to such sums as may be allowed to the trustee out of the estate in respect of the work done. The just conclusion from the facts in the present case appears to me to be that Mr. *Morgan* directed the Messrs. *Fladgate* to advance the funds in their hands to Mr. *Searle* upon the terms arranged between them and Mr. *Searle*, including the stipulation that the work done by the Messrs. *Fladgate* should be paid for by means of a deduction from the advance. If this view be correct, it follows that the cases of *Kelner* v. *Baxter* (1) and *Scott* v. *Lord Ebury* (2), which were relied on in argument, have no application. In both those cases the defendants were sued on contracts which they had purported to enter into as agents for non-existing principals, and it was held that the defendants were personally liable, on the ground that the contract which they had entered into could not be adopted or ratified by a person not ascertained at the time of the act done. Here no contract has been entered into by Messrs. *Fladgate* as agents for any one, and the question is not whether Mr. *Morgan* is bound by some act purported to be done by Messrs. *Fladgate* on behalf of the non-existent trustees of the settlement, but whether he has impliedly entered into an agreement with Messrs. *Fladgate* as to services rendered by them of which he and his co-trustees have had the benefit. I come to the conclusion, therefore, that Messrs. *Fladgate* were retained to act as solicitors for Mr. *Morgan* and his co-mortgagees, and I proceed now to inquire whether any breach of duty is chargeable against them. Now, it was known from the very first, as appears from the letters in October, 1883, that the proposed advance was to be made by trustees, and Mr. *Smith*, in fact, took upon himself the duty of advising whether that advance was one which could properly be made out of trust funds. How is such a duty to be discharged by the person who undertakes it?

(1) Law Rep. 2 C. P. 174. (2) Law Rep. 2 C. P. 255.

STIRLING, J. 1890 BLYTH v. FLADGATE. MORGAN v. BLYTH. SMITH v. BLYTH.

A trustee cannot delegate the execution of the trust; all that he is entitled to do is to avail himself of the services of others wherever such employment is, according to the usual course of business: *Learoyd* v. *Whiteley* (1). It is, therefore, the duty of a solicitor not so much himself to form, or express an opinion on the value of the property offered to a trustee as security for an advance (though the law does not prohibit him from so doing, if he thinks fit), as to see that the trustee has before him the proper materials for forming a judgment of his own. He ought, therefore, to see not only that the trustee has before him proper valuations of the property, but that he is made acquainted with any facts known to the solicitor, and not appearing by the valuations, which may affect the value of the property, and that his attention is directed to any rules laid down by the Courts for the guidance of trustees with reference to such matters. That such rules exist is shewn by the cases of *Learoyd* v. *Whiteley* (2) and *In re Salmon* (3). To those rules, therefore, it would be the duty of the solicitor to call the attention of the trustee whom he was advising. It has been seen that, down to the 23rd of November, 1883, Mr. *Smith* advised against the security. The only ground which he had for altering his opinion he stated to have been what Mr. *Philip Thomas Blyth* told him, *i.e.*: "He seemed to think, and I did too, that Mr. *Sanders* had spoken rather severely against the property." He was asked: "What induced you to think that Mr. *Sanders* had taken too gloomy a view of the security—you had no information about the property except what he gave you?"—"No." "What induced you to think that?"—"What Mr. *Blyth* told me after his interview with him." "Not anything Mr. *Sanders* told you?"—"No; I had not seen him. I do not think I had seen him between the dates of his reports and the end of November, 1883." "Did Mr. *Blyth* communicate to you his impression that he thought Mr. *Sanders* had spoken rather severely against the property?"—"Yes." "And you accepted that?"—"I did." Subsequently, in reference to his letter of the 23rd of November, 1883, Mr. *Smith* was asked: "Did you not refer there to the rule that,

(1) 12 App. Cas. 734. (2) 12 App. Cas. 727, 733.
(3) 42 Ch. D. 351.

being house property, and especially house property of a small class, the trustees should not have advanced more than one-half?"—"Certainly not; I had not it present to my mind at all." "What was present to your mind?"—"About two-thirds." "At that time the values you had got were £2600 for the additional security, and £13,762 for the *Bowes Park* property, two-thirds of which would be about £10,840, and £11,000 would be too much?"—"Yes." "You are quite sure that was the view?"—"Certainly; if I had had the half rule in my mind, I should never have touched the thing at all"; and he added, "I should not have gone on with it." Mr. *Smith* was asked, with reference to an interview with Mrs. *Blyth*, the tenant for life: "Did you tell Mrs. *Blyth* at that interview that the trustees ought not to lend more than one-half?"—"I did not." "Or anything about any rule?"—"No, I did not; I certainly did not tell her as to the one-half, because I had not it in my mind." "Did you tell her any rule as to the two-thirds?"—"No, I do not know that I did tell her that; I might have done it." And, in answer to questions as to what particulars he gave Mr. *Morgan*, Mr. *Smith* said: "I have no doubt I gave him much the same particulars as I had given to Mrs. *Blyth* on the same day." Mr. *Morgan* in his evidence said he was told that it was "good enough," and that he thought that was sufficient. I come to the conclusion that Mr. *Smith* entirely omitted to call the attention of Mr. *Morgan* to the rules laid down by the Court for the guidance of trustees, and that in that respect he failed in his duty. Further, I think that the evidence shews that he omitted to bring to Mr. *Morgan's* attention matters known to him which materially affected the value of the property as a security; as, for example, the fact that the property was in a depressed condition. In my judgment, therefore, Mr. *Smith*, and through him the firm of Messrs. *Fladgate, Smith, & Fladgate*, failed to discharge the duty which he and they had undertaken towards Mr. *Morgan*, and Mr. *Smith* and Mr. *William Francis Fladgate*, the surviving members of the firm, are liable for negligence.

It was contended, however, that if that were so, this action was premature, as up to the present time the Plaintiff, Mr. *Morgan*, had suffered no damage, and for that contention the case of

STIRLING, J. 1890 BLYTH v. FLADGATE. MORGAN v. BLYTH. SMITH v. BLYTH.

Hughes-Hallett v. *Indian Mammoth Gold Mines Company* (1) was relied on. That was, however, simply an action for indemnity arising out of an obligation to indemnify against calls on shares standing in the plaintiff's name. The company in which the shares were held had been ordered to be wound up; but there was no evidence to shew whether calls were likely to be made in the winding-up. The action was dismissed on the ground that it was merely a *quia timet* one. Here the *cestuis que trust* under the settlement have brought an action against Mr. *Morgan*, and have recovered judgment against him, though they have not enforced it. I do not think that under those circumstances the action can be treated merely as a *quia timet* one; and, consequently, the ground of the decision referred to fails. Further, the action in that case was founded on an obligation to indemnify; but here the action is founded on a breach of duty on the part of solicitors, and between the two classes of actions there is a great difference. In an action for indemnity time does not begin to run until the party entitled to the indemnity has made a payment: *Collinge* v. *Heywood* (2). On the other hand, in an action for negligence time begins to run from the date of the act complained of, and runs even although that act may not be discovered until the expiration of six years from its commission: *Howell* v. *Young* (3); and with respect to the damages recoverable, the law is thus laid down by Mr. Justice *Holroyd* (4): "If the action had been brought immediately after the insufficient security had been taken, the jury would have been bound to give damages for the probable loss which the plaintiff was likely to sustain from the invalidity of the security. It appears to me, therefore, that the subsequent special damage alleged in this declaration did not constitute any fresh cause of action. That being so, the cause of action did not accrue within six years, and the rule, therefore, must be discharged."

I am of opinion, therefore, that Mr. *Smith* and Mr. *William Francis Fladgate*, as the surviving members of the firm of Messrs. *Fladgate, Smith, & Fladgate*, are liable for the negligence of Mr. *Smith*, and that there must be an inquiry as to the damages sus-

(1) 22 Ch. D. 561.
(2) 9 Ad. & E. 633.
(3) 5 B. & C. 259.
(4) Ibid. 268.

tained by Mr. *Morgan* by reason of such negligence. It remains still to be considered whether the other relief claimed ought to be granted. As regards the first part of the claim, Messrs. *Fladgate, Smith, & Fladgate* have no longer the trust funds in their hands. They have paid them to the mortgagor, Mr. *Searle*, or to his use, by the direction of the mortgagees, of whom the Plaintiff, Mr. *Morgan*, is one; and I fail to see how they can, at Mr. *Morgan's* instance, be required to replace the funds. Again, Mr. *Morgan* claimed a declaration that he was entitled to be recouped out of the beneficial interest of his co-trustee, Mr. *Philip William Blyth*, any sum paid or to be paid by him in replacing the trust funds, or for the costs of *Blyth* v. *Smith*, and to a charge for the same on that beneficial interest. That relief was sought on the authority of the case of *Raby* v. *Ridehalgh* (1), where it was held that trustees who had made an improper investment at the instance and request of *cestuis que trust*, were entitled to recover against the *cestuis que trust* who instigated the breach the benefit actually received by them in consequence of such breach of trust. Lord Justice *Turner* (2) said: "It seems to me to be the necessary consequence of the *cestuis que trust* for life having received the income of the trust fund unduly invested, that the trustees have a right to be indemnified as against the *cestuis que trust* for life, or their estates, to the extent to which those estates have been benefited by the improper investment."

In the present case that authority seems to me to be inapplicable. Mr. *Philip William Blyth's* interest in the trust funds is entirely reversionary; he has not received any part of it; and he has derived no benefit from the breach of trust. Further, he does not appear to me to have instigated the breach of trust in the sense in which that expression was used in the judgment just cited. What he did was to acquiesce, as Mr. *Morgan* did himself, in an investment really instigated by Mr. *Philip Thomas Blyth*. Equally with Mr. *Morgan* he neglected his duty, as trustee, with reference to the investment. The case of *Bahin* v. *Hughes* (3) shews that one of two trustees liable for a breach of

(1) 7 D. M. & G. 104. (2) 7 D. M. & G. 110.
(3) 31 Ch. D. 390.

STIRLING, J. 1890 BLYTH v. FLADGATE. MORGAN v. BLYTH. SMITH v. BLYTH.

trust is not entitled to an indemnity from the other unless there are special circumstances. In the present case there are no circumstances which would entitle Mr. *Morgan* to throw the liability for the breach of trust on Mr. *Philip William Blyth*. Doubtless, it is possible that questions of contribution may hereafter arise between them, but at present Mr. *Morgan* has paid nothing in respect of his liability, nor has he even been called upon to pay anything, and in that respect the action appears to me to be premature. Further, it seems to me probable that these rights might be adjusted by means of the proceedings in *Blyth* v. *Smith*; but in case there should be any doubt as to that, I am willing, if the Plaintiff, Mr. *Morgan*, desires it, to reserve to him liberty to apply with reference to any question of contribution or otherwise which may arise between him and Mr. *Philip William Blyth*; but that ought not, I think, to affect Mr. *Philip William Blyth's* right to costs. I propose, therefore, to direct an inquiry what is the amount of damage which has been occasioned to the Plaintiff, Mr. *Morgan*, by the negligence of Messrs. *Fladgate, Smith, & Fladgate*, and to order that the amount of such damages, when ascertained, be paid by the Defendants, Messrs. *Smith* and *William Francis Fladgate*. There will be liberty for the Plaintiff to apply as to any question of contribution or otherwise which may arise between him and the Defendant, Mr. *Philip William Blyth*. The Plaintiff's costs of the action must be borne by the Defendants, Messrs. *Smith* and *W. F. Fladgate*. The Plaintiff must pay the costs of Mr. *Philip William Blyth*.

The third action, *Smith* v. *Blyth*, is one by Mr. *Horace W. Smith* against his co-trustee, Mr. *Philip William Blyth*, for contribution. It was met by a counter-claim on the part of Mr. *P. W. Blyth* against Messrs. *Smith* and *William Francis Fladgate*, and the legal personal representatives of Mr. *William Mark Fladgate*, alleging that the firm of Messrs. *Fladgate, Smith, & Fladgate* acted as solicitors for the mortgagees, and were guilty of negligence, and seeking relief on that footing. That raised a question as to whether the relation of solicitors and client existed between the firm and Mr. *P. W. Blyth* similar to that which I have already dealt with in the action of *Morgan* v. *Blyth*. It is necessary, however, to consider it separately, because in this action

the evidence is somewhat different. Mr. *P. W. Blyth* was called as a witness, and he said that he saw Mr. *Smith* upon one or two occasions before he executed the deed appointing him a trustee, one of them being in the latter part of November or beginning of December, 1883. On that occasion, according to his evidence, he "was silent, or comparatively so." Another interview took place on the 13th of April, 1884, when Mr. *Philip William Blyth* signed the deed appointing himself trustee. [After referring to the evidence *viva voce*, his Lordship continued:—]

It, therefore, appears that Mr. *P. W. Blyth* maintained that he gave express instructions that the proposed security should be looked into by Messrs. *Fladgate* on his behalf. Having heard his evidence, I am bound to say that I feel considerable doubt whether in that respect it can be relied upon. I do not attribute to Mr. *P. W. Blyth* the intention of wilfully misleading the Court; but I think it is very possible that his memory may have misled him in speaking of matters which occurred upwards of six years ago, and which have since formed the subject of much discussion and controversy in more than one legal proceeding to which Mr. *P. W. Blyth* has been a party. I, therefore, do not rest my judgment on that part of Mr. *Blyth's* evidence. Mr. *Smith* was again called, and gave evidence similar to that given by him in *Blyth* v. *Smith*, and he stated in regard to the entries in the journal that the heading did not necessarily indicate the client; and that I am quite prepared to believe. He further said, that if the mortgage had not gone through it would have been a matter of grave consideration as to who would have been charged. That seems to me to confirm the view which I have already expressed as to the circumstances under which the business was undertaken by Messrs. *Fladgate*. It appears to me that Mr. *P. W. Blyth* was well aware that Messrs. *Fladgate* were making investigations into the nature and value of the security, and that in his case, no less than that of Mr. *Morgan*, the facts are such as to justify the inference that there was an implied contract that Messrs. *Fladgate* should be paid for their services. I come, therefore, to the conclusion that Mr. *Smith*, having been guilty of negligence as solicitor to Mr. *Philip William Blyth*, cannot claim from him any contribution in respect of the liabilities imposed by the

STIRLING, J. 1890 BLYTH v. FLADGATE. MORGAN v. BLYTH. SMITH v. BLYTH.

judgment given in *Blyth* v. *Smith*: see *Lockhart* v. *Reilly* (1); and, further, that Mr. *Philip William Blyth* is entitled to relief similar to that which I have held ought to be given to Mr. *Morgan*. It is, however, to be observed that Mr. *Philip William Blyth* seeks relief not only, like Mr. *Morgan*, against Mr. *Smith*, and Mr. *William Francis Fladgate*, but also against the representatives of Mr. *William Mark Fladgate*, and it may be right that I should express my views on that part of the case. Now, if the claim of Mr. *P. W. Blyth* be considered to arise *ex delicto*, the maxim, "*Actio personalis moritur cum personâ*," affords an answer on the part of the legal personal representatives of the deceased partner, Mr. *William Mark Fladgate*. The claim may, however, be regarded as arising *ex contractu*, and as founded on an implied promise on the part of the firm to exercise reasonable care and skill in the performance of their duties as solicitors of the Plaintiff in the counter-claim. At law, previously to the *Judicature Acts*, declarations in actions against solicitors for negligence were frequently framed on that principle, *in assumpsit*, as appears from the case of *Howell* v. *Young* (2); see also *Bullen* and *Leake's* Pleadings (3); and *Sawyer* v. *Goodwin* (4) is a decision in Equity founded upon it. The contracts of partners are at law joint contracts, and not joint and several, as is shewn by the case of *Kendall* v. *Hamilton* (5); consequently, if an action at law were brought, Mr. *Smith* and Mr. *William Francis Fladgate* would be the proper Defendants. It appears, however, from what was laid down in the case just cited, and from the decision of the Court of Appeal in *Beckett* v. *Ramsdale* (6), that in Equity a creditor of a firm has a concurrent remedy against the estate of a deceased partner—a remedy which was actually applied in the case of *Sawyer* v. *Goodwin*, arising out of a breach of duty on the part of a firm of solicitors. In my opinion, therefore, the legal personal representatives of Mr. *William Mark Fladgate* were properly made Defendants to the counter-claim, and his estate is liable for the amount of damages which may

(1) 25 L. J. (Ch.) 697.
(2) 5 B. & C. 259.
(3) 3rd Ed. pp. 83, 84; 4th Ed. Pt. I. p. 340.
(4) 36 L. J. (Ch.) 578.
(5) 4 App. Cas. 504.
(6) 31 Ch. D. 177.

STIRLING,J. 1890 BLYTH v. FLADGATE. MORGAN v. BLYTH. SMITH v. BLYTH.

be found due to Mr. *Philip W. Blyth*. If the executors do not admit assets, there must be judgment for administration on the basis of the form adopted in *Hills* v. *M'Rae* (1) and *Beckett* v. *Ramsdale* (2). The result is, that the action of *Smith* v. *Blyth* must be dismissed with costs. On the counter-claim, there must be an inquiry as to damages similar to that directed in *Morgan* v. *Blyth*, and an order for the payment of the amount, when ascertained, by Mr. *Smith*, Mr. *William Francis Fladgate*, and the executors of Mr. *William Mark Fladgate*, by whom also the costs of the counter-claim must be paid.

Solicitors: *Upton, Atkey, & Upton; Farebrother; Horace W. Smith; Le Brasseur & Oakley.*

T. F. M.

LIVERPOOL AND MANCHESTER AËRATED BREAD AND CAFÉ COMPANY *v.* FIRTH.

STIRLING,J. 1890 *Dec.* 6.

[1890 M. 1314.]

Action against many Defendants—Appearance by several Solicitors—Severance of Defences—Discovery—Interrogatories—Payment into Court for Costs—Rules of Supreme Court, 1883, *Order* XXXI., *r.* 26—*Construction.*

Several Defendants against whom an action was brought to make them liable for alleged misconduct, and also for the payment of large sums of money, appeared by different solicitors, and severed in their defences.

On a summons asking that each Defendant might be ordered to make an affidavit of documents, and for liberty to deliver interrogatories to each Defendant:—

Held, that the Plaintiff company must pay into Court, under Order XXXI., rule 26, of Rules of Supreme Court, 1883, separate sums of £5 for each Defendant, both for discovery and for leave to serve interrogatories before an order could be made.

Smith v. *Reed* (3) followed.

ADJOURNED SUMMONS.

This action was brought by the *Liverpool and Manchester Aërated Bread and Café Company, Limited*, against five Defendants,

(1) 9 Hare, 297. (2) 31 Ch. D. 177.
(3) W. N. (1883), 196.

STIRLING, J. 1890 LIVERPOOL AND MANCHESTER AËRATED BREAD AND CAFÉ COMPANY v. FIRTH.

four of whom were directors, and the fifth a promoter of the company; and by it the Plaintiff company sought to make the Defendants liable for their alleged misconduct in the affairs of the company, and to obtain payment from them of large sums of money. The Defendants, who had been served separately, appeared by different solicitors, and severed in their defences. A summons was taken out by the Plaintiff company, asking that each of the Defendants might be ordered, within ten days after service of the order, to file a full and sufficient affidavit of documents relating to the matters in question, and that the Plaintiff company might be at liberty to deliver to each of the Defendants interrogatories in writing, and that each of the Defendants should, within ten days, answer the questions in writing by affidavit.

On the hearing of the summons in Chambers the Plaintiff company's solicitors claimed to be entitled to the order upon payment of the sum of £5 only into Court on the application for discovery, and another sum of £5 on the application for leave to serve interrogatories; but the Chief Clerk dissented, and held that separate deposits of £5 must be made in respect of each Defendant in each case, as was decided in *Smith* v. *Reed* (1). The summons afterwards came before the Judge in Chambers, and was then adjourned into Court.

Chadwyck Healey, for the Plaintiff company:—

Order XXXI., rule 26, of the Rules of Supreme Court, 1883, is that "any party seeking discovery by interrogatories shall before delivery" of them "pay into Court to a separate account in the action, ... to abide further order, the sum of £5; and if the number of folios exceeds five, the further sum of 10*s.* for every additional folio. Any party seeking discovery otherwise than by interrogatories shall, before making application for discovery, pay into Court to a like account, to abide further order, the sum of £5, and may be ordered further to pay into Court . . . . such additional sum as the Court or a Judge shall direct" . . . . ; and the true construction of the rule, as submitted, is that in this case only £5 for leave to serve interrogatories, and another £5 for seeking discovery, should be ordered

(1) W. N. (1883), p. 196.

to be paid into Court, as was ordered in the case of *Eder & Co.* v. *Attenborough* (1), where all the preceding cases upon the rule were discussed.

[STIRLING, J.:—I may state that since this summons was before me in Chambers I have made inquiries of two Judges of the Queen's Bench Division, and also as to the practice in the Chambers of the Chancery Division, and, as I understand, the decision in the case of *Smith* v. *Reed* (2) has in the Chambers of both divisions been followed; that is to say, where Defendants have appeared separately there has been required a separate payment of £5 into Court for each Defendant. That practice has subsisted for more than seven years, and unless it be intended to overrule that case I cannot depart from the practice which has grown up.]

There is also the case of *Campbell* v. *Lord Poulett* (3), where an action was brought against five defendants, and only one sum of £5 was ordered to be paid into Court; and also the case of *The Whickham* (4), where there were several co-owners of a ship, and one sum of £5 was held to be sufficient. Those cases apply here. The intention of requiring the payment of £5, which was fixed as an arbitrary sum, with 10*s.* additional for extra folios, was to insure *bona fides* in the applicant seeking discovery; and the test of that should not be whether several pieces or one piece of paper be delivered to the defendants. It is submitted that the application should be granted.

Dunham, for the Defendant *Macdonald*:—

[STIRLING, J.:—I do not wish to hear you in reference to the interrogatories, but only as to application for discovery.]

In the case of interrogatories a further sum must be paid if the number of folios exceed five; but as to discovery, there is not that additional sum, and yet one Defendant's affidavit may be much longer than any of the others, and be amplified according to the number of documents in his possession, and that would increase the expense. It is submitted that the same rule should be applied to discovery, as it has been to interrogatories.

(1) 23 Q. B. D. 130.
(2) W. N. (1883), p. 196.
(3) W. N. (1884), p. 48.
(4) 53 L. T. (N.S.) 236.

STIRLING, J. 1890 LIVERPOOL AND MANCHESTER AËRATED BREAD AND CAFÉ COMPANY v. FIRTH.

Grosvenor Woods, for the Defendant *Leigh* :—

The sum of £5 is not a mere guarantee of good faith, but as security for costs. The Plaintiffs will have an interest in the sum paid into Court, because if they should succeed in the action it will be paid out to them. Great difficulties may arise as to how the sums should be apportioned amongst the different Defendants if the application should be granted. Where there are separate defences there should be separate payments into Court: *Jubb* v. *Bibbs and Hill* (1).

STIRLING, J. :—

In this case I am asked to put a construction on rule 26 of Order XXXI. of the Rules of Supreme Court, 1883, and which was made in that year. That rule provides that "any party seeking discovery by interrogatories shall before delivery of interrogatories, pay into Court to a separate account in the action, to be called 'Security for Costs Account,' to abide further order, the sum of £5, and if the number of folios exceeds five, the further sum of 10*s.* for every additional folio." Now, in November, 1883, that rule was considered in the case of *Smith* v. *Reed* (2) by Lord *Field*, at that time Mr. Justice *Field*, who was sitting in Chambers. The action was brought to recover damages for an alleged fraud on the part of the seven defendants as directors, and the secretary of the *Milford Docks Company*. The defendants had appeared, and were represented by different solicitors. The plaintiff had without leave (the action being one for fraud) delivered interrogatories to each of the seven defendants, but he had paid into Court as security for costs under the rule only the sum of £10, and Mr. Justice *Field* ordered that he should make the prescribed deposit in respect of each set of interrogatories which he had delivered, and I have been informed by those whom I believe to be good authorities, that the rule laid down in that case has been uniformly observed in the Chambers both of the Queen's Bench and the Chancery Divisions of the Court, except in a case to which I will presently refer.

Now, the present case is precisely similar to that of *Smith* v. *Reed*. This is an action brought against several directors and a

(1) W. N. (1883), p. 208. (2) W. N. (1883), p. 196.

promoter of the company for misconduct, and the Plaintiff company seek to obtain payment of large sums of money from them for, as alleged, improper acts. It is probable that each Defendant may have a separate defence. The Defendants have appeared separately by different solicitors, and have properly severed in their defences, and it is now sought to obtain leave to interrogate them. It appears to me that unless the practice has been altered by the decision in the case of *Eder & Co.* v. *Attenborough* (1), I ought to follow the practice which has so long prevailed; for it is much better, in my opinion, to adhere to what has been the practice in the Chambers of both divisions of the Court than that a Judge should attempt to set up what he may consider to be a better practice. The decision in the case of *Eder & Co.* v. *Attenborough* was by a Divisional Court. That action was brought against many defendants for several causes of action; but the defendants appeared jointly and delivered a joint defence, and it was held that the decision in *Smith* v. *Reed* (2) ought not to be applied, and it was ordered that £5 only should be paid into Court before the delivery of interrogatories. Now, did the two learned Judges intend to overrule the decision in the case of *Smith* v. *Reed*? I think that they did not. They distinguished that case. Mr. Baron *Pollock*, in giving judgment, said (3): "This is not a case of different defendants defending by separate solicitors, and each having independent rights"; and Mr. Justice *Field* said (4): "The defendants rely on my decision on the case in which I held that payment of £5 was not enough. But in that case the party had delivered separate and distinct sets of interrogatories, one set to *A.*, and one to *B.*, and so on, and I thought, and still think, that I was right in holding that a deposit in respect of each set was necessary." It is plain to my mind that the two learned Judges did not intend to overrule the decision in *Smith* v. *Reed*. Whether the decision in the case of *Eder & Co.* v. *Attenborough* was quite consistent with that in *Smith* v. *Reed* I need not discuss; as I have said, I think I ought to follow that in *Smith* v. *Reed*, unless it has been overruled. It was said that the obligation to make the deposit is imposed as a

(1) 23 Q. B. D. 130.
(2) W. N. (1883), p. 196.
(3) 23 Q. B. D. 133.
(4) Ibid. 134.

STIRLING, J. 1890 LIVERPOOL AND MANCHESTER AËRATED BREAD AND CAFÉ COMPANY v. FIRTH.

test of the *bona fides* of the party applying for leave to deliver interrogatories; but I hardly think that that concludes the question, because the plaintiff may have a good case against one defendant for delivering interrogatories and not against the others, and the requiring him to make a separate deposit in respect of each set of interrogatories might be a test of his *bona fides* as against the various defendants. However, I decide the present case upon the ground that it is undesirable to disturb the practice which has hitherto prevailed in both the divisions of the Court. If that practice be erroneous, and requires to be reformed, it should be done by a higher Court than this. I now come to the other part of the rule which deals with discovery. It is, that "Any party seeking discovery otherwise than by interrogatories shall, before making application for discovery, pay into Court, to a like account, to abide further order, the sum of £5, and may be ordered further to pay into Court, as aforesaid, such additional sum as the Court or a Judge shall direct." It was said that that leaves the additional sum to be paid to the discretion of the Court. My view as to the construction of the rule is this, that instead of prescribing an additional sum where probably £5 would be insufficient in reference to the length, it was considered that it would be impossible for a Judge to specify the extra sum in the same way as in regard to interrogatories. The language of that part of the rule is in other respects identical with the former part of the rule which deals with interrogatories. I think that the construction which has been put upon the former part of the rule in the case of *Smith* v. *Reed* (1) ought to be put upon the other part of it; therefore, I come to the conclusion that separate sums of £5 must be paid into Court in respect both of leave to serve interrogatories and of the affidavit of discovery of documents for each Defendant. The costs of this application will be costs in the action.

Solicitors: *Marsland, Hewitt, Everett, & Urquhart,* agents for *J. T. Doyle, Manchester; Hodgkinson & Watts; Crowders & Vizard,* agents for *Hockin, Raby, & Beckton, Manchester.*

(1) W. N. (1883), p. 196.

T. F. M.

STIRLING, J.
1890
Nov. 6;
Dec. 13.

In re SLEVIN.
SLEVIN *v.* HEPBURN.

[1890 S. 568.]

Will—Construction—Charitable Gift—Cy-près.

A testator by his will gave a number of legacies to various persons, using the introductory words, "I bequeath the pecuniary legacies following." He then gave a number of legacies to various institutions, churches, and bodies, using the introductory words, "I bequeath the following charitable legacies"; and amongst such last-mentioned legacies was one to an orphanage voluntarily maintained by a lady at her own expense, which was in existence at the time of the testator's death, but was discontinued shortly afterwards, and before his assets were administered:—

Held, (1st) that as the legacy was to a private institution, maintained at the expense of an individual, the Court could not, on the failure of the particular charity, apply the legacy *cy-près*:—

Held, (2ndly) that the introductory words were made use of merely as a convenient mode of grouping together the various institutions which the testator meant to benefit, and that no general charitable intention could be inferred from them; and

Held, accordingly, that the legacy fell into the residue of the testator's estate.

Clark v. *Taylor* (1) followed.

Hayter v. *Trego* (2) explained.

Adjourned Summons.

John Slevin, late of *Morpeth*, in the county of *Northumberland*, by his will, dated the 14th of February, 1883, appointed his brother, the Plaintiff, *Michael Slevin*, and the Defendants, *Hepburn* and *Fogan*, his executors and trustees, for the purposes thereinafter mentioned, and, after a specific bequest to his wife, proceeded: "I bequeath the pecuniary legacies following, namely, ..." Then followed a number of legacies of sums of money to various persons; after which the testator continued: "I bequeath the following charitable legacies, namely, ..." Then followed a number of legacies of sums of money to various Roman Catholic institutions, churches, and bodies; and amongst such last-mentioned legacies was the following: "To the *Orphanage of St. Dominic's, Newcastle-upon-Tyne*, £200. . . ." The

(1) 1 Drew. 642. (2) 5 Russ. 113.

STIRLING, J. 1890 *In re* SLEVIN. SLEVIN *v.* HEPBURN.

testator then continued: "And I direct that the receipts or receipt of the respective treasurers, secretaries, ministers, or managers, or any of them respectively for the time being of the said institutions, churches, or bodies, shall be a sufficient discharge to my executors and trustees for the said charitable legacies respectively, and that the same legacies shall be paid exclusively out of such parts of my personal estate as may be lawfully applied to charitable purposes, and preferably to every other payment thereout." The testator then devised and bequeathed his residuary, real, and personal estate to his trustees upon trust to pay his debts, funeral and testamentary expenses and legacies, and subject thereto as to one-fourth in trust for his wife, and as to another fourth in trust for the Plaintiff, *Michael Slevin*, and as to the other two-fourths in trust for other persons.

The testator, who was a Roman Catholic, died on the 24th of February, 1883. His will was duly proved, and this was an application by summons, taken out by his residuary legatees, that it might be declared that the legacy of £200 given by the will of the testator to the *Orphanage of St. Dominic's, Newcastle-upon-Tyne*, had lapsed and formed part of the testator's residuary estate.

The summons was originally taken out against the executors of the will and Mrs. *Emily Priestman*, of *Mentone*; but it was directed to be amended by adding the Attorney-General as a Defendant; and this having been done, it was adjourned into Court.

As to the orphanage in question, Mrs. *Emily J. Priestman*, in an affidavit sworn on the 6th of May, 1890, gave the following evidence: "About the year 1874 I undertook the charge of four or five orphan girls, and rented a small house for them in *Newcastle-upon-Tyne*, and placed them there under the care of a matron. At that time I was residing with my husband at *Benwell*, near *Newcastle*. The number of orphans under my charge gradually increased, and I found it necessary to rent a larger house for them, and at last, in or about the year 1878, I bought a house, No. 14, *Shield Field Green*, *Newcastle*, for the sum of £1450, and established the orphans there (who at that time

numbered nearly thirty), under the care of a matron and a governess. The said house is situate in a Roman Catholic district known as *St. Dominic's*, and I gave my said undertaking the name of *St. Dominic's Orphanage*, and caused the said name to be displayed on a brass plate fixed on the door, where it remained until the house was sold in 1883, as hereinafter stated. In the year 1879 I had a serious illness, and I was compelled in consequence to spend the winter of that year abroad. My matron was then on the point of leaving, and as I was anxious about the orphanage I arranged with some Dominican Sisters to take charge of the orphanage during my absence, and I paid them for such service. I returned to *Newcastle* in the summer of 1880, and, being much dissatisfied with the way in which the orphanage had been looked after in my absence, I at once relieved the said Sisters of their charge, and appointed a new matron. . . . . In the summer of 1881 . . . . the testator, *John Slevin*, visited the orphanage, and was shewn over it by the matron, Miss *A. Hogan*. I was informed by the said Miss *Hogan* at the time that the said *John Slevin* had expressed himself as greatly pleased with what he had seen, and as intending to leave me something by his will to help the work. . . . . In or about May, 1882, having been advised by my medical men that I must not live any longer in the North, my husband and I left *Newcastle*, and went to reside at *Clifton*, in a house that we bought there. As I wished to keep my orphanage together, and, if practicable, to establish it at *Clifton*, I removed most of the children from *Newcastle*, and placed them in various orphanages in the neighbourhood of *Clifton*. Some six or seven of the girls, however, were left at the house, No. 14, *Shield Field Green*, under the care of Miss *Hogan*, to be trained for service; and they, or some of them, remained there with Miss *Hogan* until about the end of March, 1883. On the last of them leaving, the house became empty, and remained so until the latter part of the year 1883, when I sold it to the said sisters for £1000. My husband having died and my health continuing precarious, I at first resided near *Stroud*, . . . and I now reside at various health resorts in *England* and the South of *France*. From the time that I first undertook the charge of orphan girls the whole expenses of establishing

STIRLING, J. 1890 *In re* SLEVIN. SLEVIN *v.* HEPBURN.

the *St. Dominic's Orphanage*, and the removal of the orphans to *Clifton* in 1882, and of placing and keeping them in orphanages there, have been borne by myself. Some of the orphans so brought up by me from *Newcastle* are still in orphanages in the neighbourhood of *Clifton*, and are maintained there at my expense."

The evidence of Mrs. *Priestman* was corroborated by that of the Rev. *A. B. Tickell*, a Roman Catholic priest.

Mrs. *Priestman* appeared before the Judge in Chambers, but did not appear upon the hearing of the summons when adjourned into Court.

Welby King, for the residuary legatees under the will, in support of the summons:—

The only institution at *Newcastle* which ever answered the description of *St. Dominic's Orphanage* was a private charitable institution voluntarily maintained by the beneficence of a particular individual, viz., Mrs. *Priestman*, which institution had practically ceased to exist at the time of the testator's death; and, at all events, was discontinued before his assets came to be administered. In the case of a legacy to such an institution, according to the doctrine laid down in *Clark* v. *Taylor* (1) (which cannot be distinguished from the present case), and followed in *Fisk* v. *Attorney-General* (2), and in *In re Ovey* (3), the Court cannot execute the testator's intention *cy-près;* and the legacy fails, and falls into the residue of the testator's estate.

Ingle Joyce, on behalf of the Attorney-General:—

In this case the charitable institution (which was visited and commended by the testator in his lifetime) was in existence at the time of his death, and was carried on for a short time afterwards; and though subsequently the house in which it had been carried on may have been for some time empty, and such house was afterwards sold, the same, or a similar charity, was carried on elsewhere.

In *Hayter* v. *Trego* (4), the charity was in existence at the

(1) 1 Drew. 642.
(2) Law Rep. 4 Eq. 521, 527.
(3) 29 Ch. D. 560.
(4) 5 Russ. 113.

time of the testator's death, but was broken up before his assets could be administered; and it was held that as the testator had marked out the nature of the charity to which he wished his legacy to be applied, the Court would execute his intention *cy-près*. The decision in *Hayter* v. *Trego* (1) is directly in point; and it was not cited to the Court in *Clark* v. *Taylor* (2). Moreover, in *Clark* v. *Taylor* there is a discrepancy between the head-note and the facts as stated in the body of the report, which shews that there is an inaccuracy somewhere in the case.

[STIRLING, J.:—There certainly seems to be a mistake of some kind in the report (3).]

The case of *Attorney-General* v. *Fraunces* (4) is also in favour of the application of the legacy *cy-près*.

Again, the introductory words with which the testator prefaced the bequests, of which this was one, *i.e.*, "I bequeath the following charitable legacies," amount to a dedication to charitable purposes of the sums comprised in the bequests; and the Court ought to give effect to the general charitable intention thus shewn.

R. F. Norton, for the executors of the will.

Welby King, in reply, referred to *Russell* v. *Kellett* (5).

1890. Dec. 13. STIRLING, J. (after stating the facts of the case, continued):—

The evidence of Mrs. *Priestman* is confirmed by that of the Rev. *A. B. Tickell*. Neither of them was cross-examined, and I must take it that the orphanage, though about to be discontinued at the beginning of the year 1883, had not ceased to exist at the time of the testator's death.

(1) 5 Russ. 113.

(2) 1 Drew. 642.

(3) It is stated in the report of *Clark* v. *Taylor* in 1 Drew. 642, that "Mrs. *Enderby* discontinued the school in November, 1846," and that the testator "died in October, 1840;" but it appears from the pleadings in the cause preserved in the Public Record Office (see *Clark* v. *Taylor*, 1852 C. No. 5A), that the testator died on the 9th of October, 1846.—W. W. K.

(4) W. N. (1866), p. 280.

(5) 3 Sm. & Giff. 264.

STIRLING, J. 1890 In re SLEVIN. SLEVIN v. HEPBURN.

The question which I have to decide is, whether the legacy of £200 bequeathed to "*Orphanage of St. Dominic's, Newcastle-upon-Tyne*," ought now to be applied *cy-près*, or whether it falls into the residue of the testator's estate.

On behalf of the Attorney-General, the case of *Hayter* v. *Trego* (1) was relied upon. There *Thomas Hodson*, by his will, dated in June, 1819, gave a legacy of £500 to a voluntary society called the "*Plymouth and Devonshire Asylum for the Reception of Female Penitents.*" The testator died in June, 1821, at which time the asylum was still in existence; but on the 29th of May, 1822, long before the assets could be administered, the society was dissolved, the charitable establishment was completely broken up, and the furniture and other property belonging to it were sold. The question in the cause was, whether this sum of £500 was to be applied to a charitable purpose by the Crown under the sign manual, or was to be administered by the Court *cy-près*; and the Master of the Rolls said (2): "The testator here having marked out the particular nature of the charity to which he wished this legacy to be applied, the Court will execute his intention *cy-près*." It was assumed rather than decided that the legacy did not fail, but was to be applied somehow or other for some charitable purpose, and did not fall into residue.

The residuary legatees of Mr. *John Slevin*, on the other hand, contend that this case is governed by the doctrine laid down in *Clark* v. *Taylor* (3), and that the legacy to the *Orphanage of St. Dominic's* has fallen into the residue. In *Clark* v. *Taylor*, the gift was in these terms: "I give to the treasurer, for the time being, of the female orphan school in *Greenwich* aforesaid, patronised by Mrs. *Enderby*, the sum of £50, for the benefit of that society." It appeared by the evidence in that case that Mrs. *Enderby*, named in the will, was a lady of fortune, who had been in the habit for many years, previous to and after the year 1839, of spending her own money in the education and maintenance of several female children, sometimes in one house, sometimes in another, in *Greenwich*, which she rented in her own name. Mrs. *Enderby* for a portion of the period had a board put

(1) 5 Russ. 113. (2) 5 Russ. 115. (3) 1 Drew. 642.

STIRLING, J.

1890

In re SLEVIN.

SLEVIN *v.* HEPBURN.

up in front of the house in which she carried on the education of the female children, with the words, "Orphan Girls' School," or "Female Orphan School," or some such words, painted on it. There never was any trust or deed of endowment, or any treasurer; the school being simply a school carried on by Mrs. *Enderby* at her own expense. The question was, as here, whether the gift failed, or whether it was dedicated to charity, and was to be disposed of *cy-près*. The Vice-Chancellor, Sir *R. Kindersley*, said (1): "I must take it upon the evidence that, during the latter part of the existence of this school, at any rate, it was entirely Mrs. *Enderby's* private school. She may have had from time to time, from friends or otherwise, some trifling contributions in aid, but it appears to have been substantially maintained at her expense. The question is, whether the gift in the will is to be considered as a gift intended for charitable purposes generally, or whether it was simply intended for the benefit of a particular private charity. Now, there is a distinction well settled by the authorities. There is one class of cases, in which there is a gift to charity generally, indicative of a general charitable purpose, and pointing out the mode of carrying it into effect; if that mode fails, the Court says the general purpose of charity shall be carried out. There is another class, in which the testator shews an intention, not of general charity, but to give to some particular institution; and then if it fails, because there is no such institution, the gift does not go to charity generally: that distinction is clearly recognised; and it cannot be said that wherever a gift for any charitable purpose fails, it is nevertheless to go to charity. In many cases, it is difficult to see to which particular class the case is to be referred, and this is, to a certain extent, one of such cases. The testator seems to have assumed that this school was conducted as charity schools usually are, by means of the usual machinery, with a treasurer or some other officer appointed, into whose hands he wished the money that he left, to be paid." The same remark applies in the present case—"Did he intend the money to be paid to provide for the education of female children generally, or did he intend merely to provide for the education, exclusively, of such as were under the care of Mrs.

(1) 1 Drew. 643.

STIRLING, J. 1890 *In re* SLEVIN SLEVIN *v.* HEPBURN.

Enderby? Did he intend the £50 to go to that particular institution?" Then, after referring to the language of the will, the Vice-Chancellor said: "Now, these words do not appear to contemplate a charitable purpose generally, nor even generally the particular species of charity designated. A particular school appears to have been intended. If no such school had existed the testator could not have had the intention to benefit the particular school, and might have intended general charity; but here, upon the facts, the testator may have personally seen, and known, and approved of this school." There is evidence in this case that the testator had some knowledge of the existence of this particular school. Then, after distinguishing *Loscombe* v. *Wintringham* (1), he said this: "Now, there having been such a school as the testator describes, it being a mere private school maintained by the beneficence of Mrs. *Enderby*, I cannot say that the legacy given to it is to go to any other institution. The gift, therefore, has failed, and falls into the residue."

Clark v. *Taylor* (2) was followed by Lord *Hatherley*, when Vice-Chancellor, in *Fisk* v. *Attorney-General* (3), where, however, the legacy was given to an institution which was dissolved in the lifetime of the testator. In that case, the Vice-Chancellor said (4): "Then there is the other point, which was argued by Mr. *Wickens*, as to the gift to the charity which no longer exists. I am far from saying that that argument may not some day or other require further consideration; but there are two decisions, one by *Kindersley*, V.C. in *Clark* v. *Taylor*, the other by *Stuart*, V.C., in *Russell* v. *Kellett* (5), which expressly decide that when a gift is made by will to a charity which has expired, it is as much a lapse as a gift to an individual who has expired." In *In re Ovey* (6), Mr. Justice *Pearson*, on the authority of *Clark* v. *Taylor* and *Fisk* v. *Attorney-General*, held that a legacy (being one of several described as "money legacies for charitable purposes") in favour of a particular institution lapsed because the institution had ceased to exist at the time when the testator made his will, and consequently at the time of his death.

(1) 13 Beav. 87.
(2) 1 Drew. 642.
(3) Law Rep. 4 Eq. 521.
(4) Law Rep. 4 Eq. 527, 528.
(5) 3 Sm. & Giff. 264.
(6) 29 Ch. D. 560.

The doctrine of these cases appears to have been recognised by the Court of Appeal in *Biscoe* v. *Jackson* (1). The cases of *Clark* v. *Taylor* (2), *Fisk* v. *Attorney-General* (3), and *In re Ovey* (4), were cited in argument, and in giving judgment, Lord Justice *Cotton* says (5): "It is clear that when there is a legacy given to a particular legatee, and that legatee fails before the death of the testator—there being only the gift to the particular legatee, even though that legatee is an institution—the legacy fails."

It thus appears that there is a very considerable weight of authority—too great, in my judgment, to be disregarded in a Court of first instance—for the proposition that a legacy given to a particular charitable institution fails if the institution ceases to exist in the lifetime of the testator. It is said, however, that there is a difference where (as here) the institution is in existence at the testator's death; that in this respect the cases of *Hayter* v. *Trego* (6), and *Clark* v. *Taylor* are at variance, and that the former decision ought to be preferred. It seems clear that Lord *Hatherley*, Mr. Justice *Pearson*, and Lord Justice *Cotton*, treated the cases with which they respectively dealt as similar to the ordinary case of lapse by the death of an individual legatee in the lifetime of the testator. If the legatee survives the testator, though only by one hour, there is no lapse, and it would seem strange if in this particular case the law (which in many instances upholds gifts to charities which, if made in favour of individuals, would have failed—see *Moggridge* v. *Thackwell* (7), *Mills* v. *Farmer* (8), and cases there referred to) were less favourable to a charitable institution.

Further, it scarcely seems right that the destination of the legacy should be affected by the accidental circumstance that a longer or a shorter time is required for the administration of the testator's estate. If, then, the charitable institution intended to be benefited had been regularly organized and endowed with funds devoted to charitable purposes, and had been dissolved subsequently to the testator's death and before the payment of

(1) 35 Ch. D. 460.
(2) 1 Drew. 642.
(3) Law Rep. 4 Eq. 521.
(4) 29 Ch. D. 560.
(5) 35 Ch. D. 467, 468.
(6) 5 Russ. 113.
(7) 7 Ves. 36.
(8) 1 Mer. 55.

STIRLING, J. 1890 *In re* SLEVIN. SLEVIN *v.* HEPBURN.

the legacy, it would seem to me that the legacy ought to be devoted to the same purposes as any surplus funds of the institution remaining unapplied at the time of the dissolution; for those funds would presumably have been augmented by the payment of the legacy immediately after the testator's death. That such funds are applicable *cy-près* is shewn by many cases, of which *Spiller* v. *Maude* (1) is a recent example. I apprehend that the decision in *Hayter* v. *Trego* (2) rests on some such view of the law, and I should be prepared to follow it under similar circumstances.

In the present case, however, the institution was not organized or endowed; everything was done at the expense of Mrs. *Priestman*. If the legacy had been paid over to her at the death of the testator, the result would have been that she would have had so much less to expend out of her own moneys. It is clear, however, that the testator intended to benefit not her personally, but the institution, and she, in fact, does not now claim the legacy. Under circumstances almost identical with these, Vice-Chancellor *Kindersley* held, in *Clark* v. *Taylor* (3), that the legacy failed. The *ratio decidendi* appears to be given in the last paragraph of the judgment, which runs thus: "There having been such a school as the testator describes, it being a mere private school maintained by the beneficence of Mrs. *Enderby*, I cannot say that the legacy given to it is to go to any other institution." It is doubtless unsatisfactory that the case should have been decided without the attention of the Vice-Chancellor being called to *Hayter* v. *Trego*, and it may be thought that the distinction between the two cases savours of refinement. Still, I am unable to say that they are absolutely at variance. Further, *Clark* v. *Taylor* was decided in 1853, and, so far from being overruled, has formed the basis of subsequent decision. I think that I ought not to depart from it in a case which so nearly resembles it.

It was suggested, however, that the words with which the gift commences, "I bequeath the following charitable legacies," constituted a dedication to charitable purposes of the amounts

(1) 32 Ch. D. 158, n. (2) 5 Russ. 113.
(3) 1 Drew. 642.

of the legacies so bequeathed, and that effect ought to be given to the general charitable intention thus indicated. I think, upon consideration of the whole will, and particularly of the words which introduce the immediately preceding gifts, "I bequeath the pecuniary legacies following," that the words relied on are made use of merely as a convenient mode of grouping together the various particular institutions which the testator meant to benefit, and that it would strain them too much to hold that a general charitable intention is thence to be inferred. In my opinion, therefore, the legacy fails; but the costs of all parties, including the Attorney-General, must be paid out of the fund.

Solicitors: *Grundy, Izod, & Grundy*, agents for *W. Webb, Morpeth*; *Hare & Co.; Pattison Wigg & Co.*, agents for *Richardson, Newcastle.*

W. W. K.

KEKEWICH, J.

1890

Nov. 11, 12.

JAMES *v.* SMITH.

[1889 J. 336.]

Principal and Agent—Employment of Agent by Parol—Denial of Agency—Purchase by and Conveyance to Agent—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 7 [*Revised Ed. Statutes, vol. i., p.* 775]—*Practice—Pleading Statute—Rules of Supreme Court*, 1883, *Order* XIX., *r.* 15—*Amendment.*

Notwithstanding expressions of disapproval in *Heard* v. *Pilley* (1) and elsewhere, the decision of *Bartlett* v. *Pickersgill* (2) is not to be taken as generally overruled, but is still a binding authority in a case where the facts are the same.

If, therefore, a principal employs an agent by parol to purchase property, and the agent purchases in his own name, with his own money, and takes a conveyance to himself and denies the agency; to an action by the principal against the agent seeking a conveyance to himself, sect. 7 of the *Statute of Frauds* still affords a good defence.

The *Statute of Frauds* must be pleaded if intended to be relied on as a defence; but it is not necessary to plead any particular section. Where, however, the Defendant had pleaded sect. 4, he was not allowed to amend or to avail himself of sect. 7.

THE Plaintiff, by his statement of claim, alleged a parol agreement between the Defendant and himself that the Defendant should bid on behalf of the Plaintiff for a house which the Plaintiff was desirous of purchasing; that the Defendant had in consequence attended the sale and bid for and purchased the house as the Plaintiff's agent and on his behalf; and that he, the Plaintiff, had, on the faith of the Defendant's agreement, refrained from personally bidding for the house; but that the Defendant claimed to hold the house for his own benefit, and had taken a conveyance of it to himself, and refused to convey it to the Plaintiff; and the Plaintiff claimed a declaration that the Defendant purchased the house as his agent, and that he was a trustee thereof for the Plaintiff, and that the Defendant might be ordered to convey the house to the Plaintiff.

The Defendant, by his defence, denied that he had agreed to bid, or did in fact at the sale bid, on the Plaintiff's behalf, or that he in any manner acted on behalf of or as agent of the

(1) Law Rep. 4 Ch. 548.

(2) 4 East, 577, n.; 1 Eden, 515; 1 Cox, 15; Burr. 2255.

Plaintiff; but said that he bid for and purchased the house on his own behalf. He then alleged the existence of certain negotiations between himself and the Plaintiff with reference to the future purchase of the house from him by the Plaintiff, but said that such negotiations never ripened into a contract, and stated that he intended to rely on the 4th section of the *Statute of Frauds*.

The Plaintiff, by his reply, traversed the defence.

At the close of the Plaintiff's evidence in support of the case raised by his statement of claim, the point of law raised by the pleadings was argued.

O. L. Clare, for the Plaintiff:—

The 4th section of the *Statute of Frauds*, which has been pleaded, does not apply; and the 7th section, which has not been pleaded, cannot now be set up as a defence. A principal can appoint by parol an agent to buy land for him. No doubt the decision in *Bartlett* v. *Pickersgill* (1) is against the Plaintiff; but it was practically overruled by the Court of Appeal in *Heard* v. *Pilley* (2). It would be a fraud to permit an agent who has purchased for his principal to set up the *Statute of Frauds* and keep the property for himself. The true principle is laid down by *Jessel*, M.R., in *Cave* v. *Mackenzie* (3), that the moment the vendor signs the contract the estate in equity passes to the real purchaser, and parol evidence is admissible to shew that the person who signed the contract was not the real purchaser, but only the agent for that person; and the mere fact that the agent subsequently succeeds in getting a conveyance to himself does not deprive the principal of his rights.

Warmington, Q.C., and *Upjohn*, for the Defendant:—

Even if the Plaintiff's story be corroborated, no relief can be granted. He is seeking a declaration of trust, and in so doing is, as laid down in 1839, and again in 1862 in the same terms in *Sugden* on Vendors and Purchasers (4), going in the teeth of

(1) 4 East, 577, n.; 1 Eden, 515; 1 Cox, 15; Burr. 2255.

(2) Law Rep. 4 Ch. 548.

(3) 46 L. J. (Ch.) 564, 565.

(4) 10th Ed. vol. iii. p. 260; 14th Ed. p. 703, pl. 15.

KEKEWICH, J. 1890 JAMES v. SMITH.

sect. 7 of the *Statute of Frauds*. *Bartlett* v. *Pickersgill* (1), the authority on which that statement is based, is still good law, and is distinguishable from the cases relied on by the Plaintiff, in that there the defendant had obtained a conveyance and thus became legal owner, and the case was thus within sect. 7; whereas, in the other cases, the contract remained incomplete, and, according to the ordinary principles of equity, specific performance could be ordered. Here the Defendant has himself paid the purchase-money and taken the conveyance, the facts being the same as in *Bartlett* v. *Pickersgill*, and that case is a binding authority.

[His Lordship at this stage required the Defendant's evidence to be given.]

Clare, in reply:—

It cannot, apart from authority, be contended that a man is to get into a better position by exaggerating his fraud by taking a conveyance. [He cited and referred to *Rex* v. *Boston* (2) and *Fell* v. *Chamberlain* (3).] Again, the Defendant cannot rely on sect. 7, for he has pleaded sect. 4 of the statute. The rules require strictness in pleading, and he cannot now, because sect. 4 has no application, rely on any other, and it is too late now to amend.

Upjohn:—

Sect. 4 was evidently inserted by mistake for sect. 7. The rules are satisfied if the *Statute of Frauds* is pleaded—the particular section need not be pleaded. I submit that this is a case for amendment.

KEKEWICH, J.:—

It is no part of my judicial duty to say whether on the whole the *Statute of Frauds* has been a beneficial or mischievous statute, as to which I am, of course, aware there have been many opinions. It is quite easy for the advocates on one side or the other to argue in any case from the separate points of view which

(1) 4 East, 577, n.; 1 Eden, 515; 1 Cox, 15; Burr. 2255.
(2) 4 East, 572.
(3) 2 Dick. 484.

they hold; but certainly this case, if the plea of the statute succeeds, is an instance of an evasion by the Defendant of an engagement into which he entered. That on the evidence, I have no doubt, is the case, putting aside for the moment one point to which I attach considerable importance, namely, the terms upon which Mr. *Smith* agreed to bid for the property. Taking the Defendant simply as agent for the Plaintiff, he would evade his liability by pleading the statute, supposing that plea to be successful.

Now, a very interesting and difficult question has been raised before me, whether that plea ought to succeed in a case of this kind; and the argument has turned on the distinction between sects. 4 and 7 of that Act—a distinction which is well known to all lawyers, and has been pointed out in more than one of the cases which have been cited. The Plaintiff relied on the case of *Heard* v. *Pilley* (1) as overruling *Bartlett* v. *Pickersgill* (2). Certainly there are strong expressions falling from both the Lords Justices before whom the former case came adverse to the decision of *Bartlett* v. *Pickersgill*; and one can quite understand any counsel or editor going so far as to say that *Bartlett* v. *Pickersgill* is overruled. But I think the distinction pointed out by Mr. *Warmington* is worth attention. There is no doubt that *Bartlett* v. *Pickersgill* was a case of a different character from that of *Heard* v. *Pilley*. It was distinctly stated in argument on the part of the plaintiff in the latter case as being distinguishable, because it was not a suit for specific performance of an unexecuted contract, but one to compel the agent who had obtained a conveyance of the estate to convey it to the plaintiff; and, notwithstanding the expressions, which no doubt there are, both of Lord Justice *Selwyn* and of Lord Justice *Giffard*, especially the concluding remarks of Lord Justice *Giffard*, I think I ought to read them with reference to the case then before the Court, and not to consider them as overruling *Bartlett* v. *Pickersgill* with reference to a case on all-fours with it, and distinguishable in an essential particular from the case which was then before them for decision. I do not think, therefore, that I can take *Heard* v. *Pilley* as overruling *Bartlett* v. *Pickersgill* for all purposes.

(1) Law Rep. 4 Ch. 548. (2) 4 East, 577, n.; 1 Eden, 515; 1 Cox, 15; Burr. 2255.

KEKEWICH, J. 1890 JAMES v. SMITH.

On the other hand, I have a valuable judgment of the Master of the Rolls in a case of *Cave* v. *Mackenzie* (1), where he points out the distinction which had been relied upon in argument in *Heard* v. *Pilley* (2), and refers to the different language of the two different sections in the *Statute of Frauds*, and the result. It certainly is true that the difference is highly technical; but then the Court is dealing with a technical matter, and one must expect to find technical differences.

I think there is much force in Mr. *Clare's* argument, that a man against whom a contract can be enforced as agent ought not to escape liability by taking a conveyance—in other words, by exaggerating his fraud, and so putting himself in possession of the legal estate, so that thenceforward he will no longer be agent, but trustee. I think there is considerable force in that, and I can well understand the application under such circumstances of what Lord Justice *Giffard* says in *Heard* v. *Pilley*, that the doctrine of the Court will not allow the *Statute of Frauds* to be made an instrument of fraud, which was also so much insisted upon by Lord Justice *Turner* in a case which I always refer to on this branch of the law—*Lincoln* v. *Wright* (3).

But if the *Statute of Frauds* has stated plainly that a trust or confidence cannot be enforced unless it is expressed in writing—and the trust or confidence which a person is coming to enforce is not expressed in writing—and the *Statute of Frauds* has distinguished, as I think I am bound to hold it has, between agency and trust or confidence, and the way in which agency and trust or confidence are respectively to be proved, it seems to me that all remarks of that kind fall to the ground; and my opinion on these cases is that *Bartlett* v. *Pickersgill* (4) is still sound law, and that what Lord *St. Leonards* says in his work on Vendors and Purchasers (5) is also sound, viz.: "Where a man merely employs another person by parol, as an agent to buy an estate, who buys it for himself and denies the trust, and no part of the purchase-money is paid by the principal, and there is no

(1) 46 L. J. (Ch.) 564, 565.
(2) Law Rep. 4 Ch. 548.
(3) 4 De G. & J. 16.
(4) 4 East, 577, n.; 1 Eden, 515; 1 Cox, 15; Burr. 2255.
(5) *Sugden's* Vendors and Purchasers, 14th Ed. p. 703, pl. 15.

written agreement, he cannot compel the agent to convey the estate to him, as that would be directly in the teeth of the *Statute of Frauds*." He is referring there, I have no doubt, to the 7th section of the statute.

But then I have a point of pleading here to which my attention was only called at a very late stage—so late as, in my mind, to make it exceedingly difficult to allow any amendment. By Order XIX., r. 15, the Defendant is bound to plead the *Statute of Frauds* if he intends to rely on it—but the rule does not oblige him to plead the particular section. Here the Defendant has pleaded the 4th section; and it is admitted now that on the 4th section he must fail, and that he must rely on the 7th section. Then I am asked at the last moment to allow an amendment to be made so that his defence may read that he will rely on the 7th section. I have said frequently, and I repeat it, that there is no Judge on the Bench who is more willing to allow amendments even at the last moment than I, provided there is no surprise; but I think I should be going too far if I were to allow it in this action, and it would be introducing a laxity which I ought not to introduce. A party relies on a particular section of the statute, and when he finds the authorities to be against him he says, "I should like to rely on something else." To sanction that would, it seems to me, make pleading even more loose than it is at present, and I think I ought not to allow that amendment. Therefore, although I hold the 7th section of the *Statute of Frauds* to be applicable, I think it is not properly pleaded, and is not available to the Defendant.

[His Lordship then reviewed the evidence, and came to the conclusion, that although there was some arrangement between the Plaintiff and Defendant that the Defendant should purchase the property in order that the Plaintiff might ultimately become the purchaser, the terms of the arrangement were not proved, and that consequently he did not find the agency proved in such a way as to enable the arrangement to be enforced as against the Defendant, and ultimately gave judgment for the Defendant without costs.]

Solicitors for Plaintiff: *Gordon Ross & Douglas Norman.*
Solicitor for Defendant: *E. Lloyd.*

A. C. E.

KEKEWICH, J.

1890

Dec. 5.

WILLIAMSON *v.* HINE.

[1888 W. 294.]

Mercantile Law — Ship—Managing Owner—Ship's Husband—Ship-broker—Charters—Freights—Secret Profit—Commission—Brokerage—Custom.

In the absence of any special bargain, the managing owner of a ship is not entitled to retain, or to charge against the ship, any profit for himself, either by way of commission or otherwise, for procuring charters or freights, whether he be a ship-broker and procures them himself, or employs another broker for the purpose, the procuring of charters and freights being part of the duties incidental to the office of managing owner.

Adjourned summons.

The Plaintiff, a master mariner, was co-owner with the Defendants, Messrs. *Hine Brothers*, of a ship called the *Castle Holme*. the Defendants being the managing owners of the ship at a remuneration of £130 per annum, which was fixed by a resolution passed at a meeting of the co-owners. The Plaintiff charged the Defendants with having, while acting as managing owners of the ship, made secret profits of various kinds for themselves, including commissions on insurance premiums, apprentices' fees, and brokerage on freights and charters, and with having framed the ship's accounts in such a manner as to shew upon the face of them that they, as agents for the owners, had made no profits whatever beyond the management expenses. The Plaintiff, accordingly, brought this action, claiming a declaration that the Defendants were not entitled to retain for their own benefit any such brokerage, commissions, and other profits as above mentioned; an account; payment, with interest; and, alternatively, the like sums as money had and received or by way of damages.

The action came on for trial; and upon the 10th of December, 1889, his Lordship, in giving judgment, held that, with regard to the commissions on insurance premiums and the apprentices' fees, such knowledge or means of knowledge of their having been received by the Defendants had been proved against the

Plaintiff as to deprive him of any right to an account. As to the commission on freights and charters, his Lordship held that it was not established by the evidence that the Plaintiff had any knowledge of such commissions having been received or retained by the Defendants. Accordingly, the judgment declared that the Defendants were not liable to account for any of the commissions received by them other than commissions on freights and charters; but as to the latter the judgment directed (1) an inquiry whether it was within the duties of the Defendants as managing owners of the ship, or otherwise as agents of the Plaintiff and others the owners of the ship, to procure charters and freights for the ship; and if so (2) an account of what sums had been received by the Defendants as such managing owners or agents by way of commission, discounts, or return of premiums or brokerage in respect of such chartering or freightage; and it was declared that in case inquiry (1) were answered in the affirmative the Defendants were bound to account to the Plaintiff for what, if anything, might be certified pursuant to the said account No. 2; and the question of the costs of the action was reserved, except the costs occasioned by certain allegations against the Defendants upon which the Plaintiff had altogether failed, and which costs were ordered to be paid to the Defendants.

From that judgment the Plaintiff appealed; and on the 1st of April, 1890, the Court of Appeal (*Cotton*, *Lindley*, and *Lopes*, L.JJ.) dismissed the appeal, but without costs. With regard to the inquiry directed by the learned Judge, their Lordships, though thinking it somewhat unnecessary, as the evidence already adduced appeared to them to lead to the conclusion that it must be answered in favour of the Plaintiff, allowed it to remain, as it promised to be a very short inquiry.

The inquiry came on before the Chief Clerk, who, on the 13th of November, 1890, made his certificate answering it in the affirmative.

The Defendants then took out this summons to vary the certificate by substituting a finding in the negative.

The evidence used upon the inquiry and at the hearing of the present summons consisted of several affidavits by ship-

KEKEWICH, J.

1890

WILLIAMSON v. HINE.

brokers and others filed on either side. The Defendants' evidence went to shew that a ship-broker's business was wholly distinct from the business of a ship-manager; that it was no part of a ship-manager's business to procure charters or freights, which was purely a ship-broker's business, and that the Defendants, in becoming managing owners, did not undertake the duty of procuring freights or charters, their duty being to employ brokers to do so, and that they acted as brokers for the ship either directly or through other ship-brokers as their agents; also that, in the absence of special agreement, ship-brokers who were also managing owners were entitled, according to the usual practice stated to have prevailed for a great many years, to receive for their own use the usual commission allowed to them as brokers, besides remuneration for their management. On the other hand, the affidavits filed on the part of the Plaintiff stated that the procuring of charters or freights for a ship was one of the most important duties of a managing owner, it being, in fact, a duty inseparably connected with his office, since otherwise the ship would be unemployed.

Gorell Barnes, Q.C., and *Farwell*, for the Defendants, in support of the summons, contended that the weight of evidence was in favour of the view that, according to the custom and practice in the shipping trade, it was not one of the duties incidental to the position of a managing owner to procure charters and freights, and that if he undertook that business he was entitled to remuneration distinct from his remuneration as managing owner.

Warmington, Q.C., and *Ashton Cross*, for the Plaintiff, argued, on the contrary, that the evidence did not establish any such universal practice or custom as had been contended for, and that according to the law and practice of the shipping trade, as laid down in *Abbott* on Merchant Shipping (1) and other text-books on the subject, the procuring of charters and freights was part of the duties of a managing owner or ship's husband, and was covered by his remuneration as such.

(1) 12th Ed. pp. 62, 63.

Farwell, in reply.

KEKEWICH, J.:—

The principle upon which this inquiry is based is abundantly clear. A paid agent—I am not now concerned with an unpaid agent—a paid agent is bound to discharge all those duties, multifarious or otherwise, and onerous or otherwise, which the terms of that agency cover. He must make his own bargain with his principal, and it is his duty to do all that that bargain entails and to be content with his remuneration. If he is called upon to do anything outside the terms of his agency, he is entitled to make a special bargain, or he can decline to do it unless he is remunerated on a special footing; or he may do the work, and, provided everything is fair and above-board, he probably would be allowed some fair remuneration according to some recognised measurement of the value. But if he does anything within the terms of his agency, however uncompensated it may seem to him personally, he can neither charge for it in his account nor can he secretly take any commission for it. That is reasonably obvious. Take such a case, by way of illustration, as that of an estate agent. An estate agent's duties might be extremely difficult to define: but if the landowner requires him to see after the building of a cottage, which involves the purchase of timber, it would, I apprehend, be the duty of that estate agent to purchase the timber on the best terms obtainable; and if he happens to be a timber-merchant, he cannot supply the timber at a profit. If he deals with another timber-merchant who is disposed to give him a commission for the introduction of the business, he must either decline that commission, or if he accepts it must give his employer, the landowner, the benefit of it. If, on the other hand, the landowner requires a carriage for his own use, and he asks the estate agent to get it for him, the estate agent can, if he happens to be also a carriage-builder, sell a carriage to his employer. The transaction must be, of course, fair and above-board. I certainly had a strong impression at the trial of this action that it was part of a managing owner's duty to procure charters and freights for the ship he managed. That strong impression was confirmed by

KEKEWICH, J. 1890 WILLIAMSON v. HINE.

reference to some works of more or less authority, but still works which I do not think I can regard as really binding on me; and as the point was argued strongly I thought it right to direct this inquiry, which was based on the principle I have mentioned. Nobody ever doubted that managing owners were at liberty to employ brokers. That never came into question, though a great deal of evidence is directed to prove that they can. Nor was it, as far as I remember or know, at all doubted, nor do I doubt now, that if the managing owner is also, as frequently happens, a shipbroker, he can, so to speak, employ himself, if it is fair and above-board; but there must be no secret arrangement, and no secret profit. If he employs another broker, of course he can pay on behalf of the shipowner the moneys necessary to pay that broker. If he employs himself, he of course can pay what is necessary to be expended in making a bargain; but unless it is outside his duty as managing owner, he cannot make a profit if he employs himself, and he cannot receive a commission for his own benefit from the outside broker. The evidence has gone a long way to prove what did not really require to be proved—that brokers must necessarily be employed; and the evidence on both sides goes also to shew that managing owners, being also shipbrokers, do not only constantly, but always, procure charters and freights in one way or the other—that is, either through their own firm or from outside brokers. The Defendants' evidence does not throw much light on the question I wanted answered, namely, whether it is really part of the bargain—what I may call the common law of the trade—that the managing owner is to be remunerated for that particular work in addition to whatever other work falls within his ordinary duty. On the other hand, I have had a considerable amount of evidence on behalf of the Plaintiff to shew that it is not the right of the managing owner to make any such charge as against the ship. The strength of the Defendants' evidence is this—that it is generally done, not always, but so often as to lead one to assume that it is the prevailing custom, not in the legal sense of the word, but in common parlance. But I have nothing whatever before me to shew that it is assented to in such a way that shipowners regard it really as part of the terms of the employ-

ment of managing owners. I have nothing to shew that, when managing owners do charge, as they frequently do, this extra payment for procuring charters and freights, they do so with the assent of the particular shipowner and exclusive of a special bargain. If you have a special bargain, then, of course, the custom fails. I have not before me satisfactory evidence that, in the absence of a special bargain, there is a right on the part of the managing owner to charge this extra payment against the ship. That being so, I think I must adopt the evidence of the Plaintiff, which in my opinion is the more weighty, and hold that it is one of the duties of managers to procure charters, and that it is a duty coming within the terms of their duties and remuneration as managing owners, and in respect of which they are not entitled to make a charge or receive a commission. If they receive a commission, I think it belongs to the shipowner as the principal, and cannot properly be received by them for their own benefit. That being so, I think the Chief Clerk has come to a proper conclusion, and the certificate must stand.

I refuse the summons with costs.

Solicitors: *J. R. Hobson*, agent for *Tyson & Hobson, Maryport; H. N. Paisley*, agent for *Paisley & Falcon, Workington.*

G. I. F. C.

KEKEWICH, J.

1890

Dec. 20.

In re AGRICULTURAL HOTEL COMPANY.

Company—Reduction of Capital—Partial Reduction—Ultrà Vires—Original Capital—Preference Capital—Companies Acts, 1867 *and* 1877.

The Court may sanction a resolution passed by a limited company for the reduction of the whole of its original capital apart from any reduction of its preference capital.

In re Barrow Hæmatite Steel Company (1), *In re Quebrada Railway, Land and Copper Company* (2), *In re Gatling Gun, Limited* (3), and *In re American Pastoral Company* (4), followed.

In re Union Plate Glass Company (5) not followed.

Quære, whether the Court will sanction a reduction of part only of one class of capital.

THE *Agricultural Hotel Company, Limited*, was registered under the *Companies Acts* in 1863 with a nominal capital of £100,000 in 10,000 shares of £10 each, its principal object being the carrying on of an hotel in *London*. Of these shares 4326 were issued and fully paid up.

In 1867 and 1872 the company passed resolutions for increasing their "capital" by the issue of A and B "preference shares" respectively of £10 each, and bearing interest at 6 per cent. The company's articles contained no power to reduce capital; but in June and July, 1890, special resolutions were passed enabling the company by resolution to reduce their capital from time to time. Those resolutions were passed in consequence of the company having found it necessary to consider the question of reducing part of their capital, owing to a diminution in their business and a depreciation of their assets through competition with neighbouring hotels and other causes. Therefore, immediately afterwards, in July, 1890, the company passed special resolutions for reducing their "ordinary share capital" from £100,000 to £50,000 by cancelling £5 per share in respect of the 4326 ordinary £10 shares issued, and by reducing the nominal amount of the remaining 5674 ordinary shares from £10 to £5 each, but leaving the preference share capital unreduced.

(1) 39 Ch. D. 582.
(2) 40 Ch. D. 363.
(3) 43 Ch. D. 628.
(4) W. N. (1890), p. 62.
(5) 42 Ch. D. 513.

The company now presented a petition for the sanction of the Court to those special resolutions.

Warmington, Q.C., and *Eve*, for the Petition :—

The question is whether the Court will sanction the reduction of some only of the shares of a company, Mr. Justice *Kay* having, in *In re Union Plate Glass Company* (1), refused to sanction such a reduction ; while Mr. Justice *North* took the opposite view in *In re Barrow Hæmatite Steel Company* (2), *In re Quebrada Railway Land and Copper Company* (3), *In re Gatling Gun, Limited* (4), and *In re American Pastoral Company* (5) ; the *Gatling Gun Case* being decided after consideration of the case before Mr. Justice *Kay*. We submit that in the present case the view of Mr. Justice *North* should be adopted in preference to that of Mr. Justice *Kay* ; for there is nothing in the *Companies Act*, 1867, prohibiting a partial reduction, and we have made out a proper case for it. The case before Mr. Justice *Kay* is distinguishable in that the preference shares conferred a right of preferential dividend only ; whereas here the proper interpretation of the resolution is that the capital is preferential. Supposing an order were made for reducing both classes of capital, the company might immediately afterwards by special resolution recreate its preference capital ; so that it is wholly unnecessary to require that any order for reduction should extend to both classes.

KEKEWICH, J. :—

If the opinion expressed by Mr. Justice *Kay* in *In re Union Plate Glass Company* stood alone, it would have been my duty at once to follow it and say, as he said, that the question must be decided by the Court of Appeal. But I have three reported decisions by Mr. Justice *North*, not only differing from Mr. Justice *Kay*, but, as to one of them, so differing after considering *In re Union Plate Glass Company*. And there is a note of a still later case of *In re American Pastoral Company*, in which

(1) 42 Ch. D. 513.
(2) 39 Ch. D. 582.
(3) 40 Ch. D. 363.
(4) 43 Ch. D. 628.
(5) W. N. (1890), p. 62.

CREKEWICH, J. 1890 *In re* AGRICULTURAL HOTEL COMPANY.

Mr. Justice *North* seems to have adhered to his former opinion. I think that, under these circumstances, I am bound to exercise my own judgment in the matter; and my opinion is in favour of Mr. Justice *North's* view, and not of that of Mr. Justice *Kay*.

I hope that sooner or later the point will be settled in the Court of Appeal. It is unsatisfactory that it should remain as it is.

I do not express any opinion whether the company can reduce any part of one class of capital. Here the application is to reduce the whole of the ordinary capital, leaving intact the preference capital; and the preference capital and the ordinary capital seem to me to stand in different classes quite apart from the distinction to which Mr. *Warmington* has called my attention between the preference capital in this case and the preference capital in the case before Mr. Justice *Kay*. All I say is that, if a company desires to reduce, and has by proper resolution purported to reduce, the whole of its ordinary capital, that may be done and may be sanctioned by the Court notwithstanding that there is, outside and above that, preference capital. I think it better to say so in plain terms rather than endeavour to find distinctions which may or may not be tenable between the case before Mr. Justice *Kay* and the cases before Mr. Justice *North*.

Therefore, the order will go, and the word "reduced" must be used for a month.

Solicitors: *Kingsford, Dorman & Co.*

G. I. F. C.

In re MUNDY'S SETTLED ESTATES.

C. A.
1890
NORTH, J.
Aug. 7.
C. A.
1891
Jan. 13.

[1890 M. 1250.]

Settled Land Act—Application of Capital Money—"Improvements"—Mines—Erection of new Pumps—Devise of Real Estate to uses of Settlement, and bequest of Personalty in trust to invest in Land, to be settled to the same uses—Application of uninvested Personalty in improvements on Lands originally settled—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2, 21, 25, *sub-ss.* (*xix.*), (*xx.*), 33.

Lands under which there were mines were settled by deed in 1872. In 1874 the settlor by his will devised other real estates of his own to the trustees for the time being of the settlement, and directed that they should stand possessed thereof to the uses declared by the settlement concerning the lands comprised therein. And he bequeathed his residuary personal estate to his executors (one of whom was a trustee under the settlement), upon trust to invest the same in the purchase of land, and to settle the land so purchased to the uses declared concerning his real estates thereinbefore devised.

It was proposed to apply some of the personal estate of the testator, which had not yet been invested in land, in the erection of a new pumping engine and pumps for draining some mines included in the original settlement:—

Held, by *North*, J., that the proposed works were improvements authorized by sect. 25, sub-s. (xx.), of the *Settled Land Act*, 1882:

Held, also, by the Court of Appeal, that the settlement and will constituted one settlement under sect. 2, sub-s. (1), and that the personalty in the hands of the executors was "capital money," which might be applied in improvements on the estates comprised in the settlement, although it had never been invested in land.

In re Mackenzie's Trusts (1) and *In re Tennant* (2) approved.

SUMMONS under the *Settled Land Act*, 1882, by *Alfred E. M. Mundy*, who, under a settlement dated the 2nd of November, 1872, was the tenant for life of certain estates known as the *Shipley* estates, in *Derbyshire*, asking (1.) that it might be declared that Sir *Henry Wilmot* and *Francis N. Smith* were, by virtue respectively of the settlement and of the will, dated the 23rd of September, 1874, of *A. M. Mundy*, deceased, trustees of the settlement for the purposes of the Act, or, in the alternative, that they might be appointed such trustees; (2.) That the trustees of the settlement might be directed to approve a scheme

(1) 23 Ch. D. 750. (2) 40 Ch. D. 594.

C. A. 1891 *In re* MUNDY'S SETTLED ESTATES.

which had been left at the Chambers of Mr. Justice *North* for the execution of improvements on the lands settled by the settlement.

The summons was served upon Sir *H. Wilmot* and *Smith*, who were the trustees of the settlement, and also upon *Edward Hall*, who was a trustee of the will, Sir *H. Wilmot* and *Alfred A. E. Mundy* being the other trustees.

The object of the scheme was to provide a new engine and pumps for the purpose of draining some mines situate on the *Shipley* estates, in order to prevent the mines from being flooded with water from some old adjoining unused workings which, on the expiration of a lease, dated the 19th of January, 1866, from the Duke of *Rutland* to *A. M. Mundy*, deceased, of some adjacent mines, would be deprived of the protection which they had derived from certain barriers mentioned in that lease. On the expiration of that lease, which would happen on the 29th of September, 1902, or on its sooner determination, the Duke of *Rutland* and his tenants would be at liberty to work under the barriers, and the result of their so doing would probably be to let the water into the *Shipley* mines, and seriously damage them. It was estimated that the cost of erecting the engine and executing the other works mentioned in the scheme would be about £10,600.

By the settlement, which was made between *A. M. Mundy* and *Alfred E. M. Mundy* (his eldest son), of the one part, and Sir *H. Wilmot* and *F. N. Smith*, of the other part, the *Shipley* estates were limited to the use of *A. M. Mundy* and his assigns during his life, with remainder to the use of *Alfred E. M. Mundy* and his assigns during his life, with remainder to the use of Sir *H. Wilmot* and *F. N. Smith*, their executors, administrators, and assigns, for the term of 100 years, to commence from the death of the survivor of *A. M. Mundy* and *Alfred E. M. Mundy*, upon certain trusts thereinafter declared, with remainder to the use of the first and other sons of *Alfred E. M. Mundy* successively in tail male, with remainders over in strict settlement. The settlement contained (*inter alia*) a power for every person thereby made tenant for life of the estates, when he should be of full age and entitled to the possession thereof, and also for the trustees

during the minority of any person, who, if of full age, would be entitled to the possession or the receipt of the rents and profits of the estates as tenant for life or in tail male by purchase, to demise all or any of the mines or minerals under or upon the estates in manner therein mentioned. The settlement also gave the trustees a power of sale and exchange.

A. M. Mundy, by his will dated the 23rd of September, 1874, appointed Sir *H. Wilmot*, *Edward Hall*, and *Alfred E. M. Mundy*, to be the executors thereof. And, after bequeathing various legacies, the testator bequeathed to his executors all his personal estate not therein specially mentioned or otherwise bequeathed, upon trust by means thereof to pay his debts, funeral and testamentary expenses, and legacies. And, after directing various other payments to be made by his executors out of his personal estate, the testator gave all the freehold, copyhold, and leasehold estates not comprised in or subject to the trusts of the settlement of the 2nd of November, 1872, to which he should be beneficially entitled at the time of his death, to the trustees for the time being of that settlement. And he declared that the settlement trustees should be possessed of his said freehold and leasehold estates, to the uses and upon the trusts and subject to the powers by the said settlement declared concerning the freehold and leasehold hereditaments comprised therein. And he directed the settlement trustees to stand possessed of his said copyhold hereditaments upon such trusts and with such powers as should correspond with the uses, trusts, and powers by the same settlement declared concerning the freehold hereditaments last aforesaid, so far as the difference of tenure would permit. And, as to all his personal estate so bequeathed to his executors as aforesaid (subject to the trusts thereinbefore declared concerning the same), the testator directed that his executors should, as soon as conveniently might be after his death, invest the same in the purchase of freehold estates in *England* and *Wales*, or of copyhold or leasehold hereditaments convenient to be held therewith, and should settle the estates so to be purchased, to the uses and upon the trusts therein declared concerning his estates thereinbefore devised, or as near thereto as the nature of the premises and intervening circumstances would admit.

C. A. 1891

In re MUNDY'S SETTLED ESTATES.

The testator died on the 29th of March, 1877, and his will was proved by the executors named therein.

The scheme stated that it was proposed to erect a new engine and pumps to deal with the water in the mines in accordance with the report of Mr. *H. Davey*, a civil engineer, and that the present pumps were, from their age and construction, inadequate to deal with any additional, or even the present water, and were quite worn out, and must be renewed as soon as possible. Mr. *Davey's* report said that the present cost of pumping was, by reason of the nature of the engines and pumps in use, very extravagant, and might be reduced to an amount of £600 per annum, out of £975 per annum, by providing a new engine and pumps. It was proposed to pay the cost of the works out of residuary personal estate of *A. M. Mundy*, in the hands of the executors and trustees of his will. Some of his residuary personal estate had been invested in the purchase of land; but a large sum was still in the hands of the executors uninvested.

The summons was heard before Mr. Justice *North* on the 7th of August, 1890.

Cozens-Hardy, Q.C., and *Dibdin*, for the summons:—

The first question is, whether the proposed works are "improvements" authorized by sect. 25 (1) of the *Settled Land Act*, 1882,

(1) 45 & 46 Vict. c. 38, s. 2 (1): "Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of Court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires."

Sect. 21: "Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes (namely) (*inter alia*):—

"(iii.) In payment for any improvement authorized by this Act."

Sect. 25: "Improvements authorized by this Act are the making or execution on, or in connection with, and for the benefit of settled land, of any of the following works, or of any works for any of the following pur-

in payment for which, under sub-sect. iii. of sect. 21, "capital money" may be applied. We say that the proposed works are authorized by sub-sect. xx. of sect. 25. They are within the words "enlargement or improvement of any of those works," that is, of "preliminary works necessary or proper in connection with development of mines."

Sydney Williams, for the trustees:—

Part of the proposed works may possibly be in the nature of repairs; if so, they could not be improvements authorized by the Act.

North, J.:—

I think that which is proposed comes within the words of sect. 25, when fairly and reasonably construed.

Sub-sect. xix. of sect. 25 deals with what are called "preliminary works" in connection with mines. It speaks of "trial pits for mines and other preliminary works" (trial pits are clearly preliminary) "necessary or proper in connexion with development of mines." I think that refers to preliminary works necessary for the development of mines.

Then sub-sect. xx. provides for something more. If preliminary works are already provided for by sub-sect. xix., I do not see what sub-sect. xx. is wanted for, if it also is to be confined to "preliminary works." I do not think it is. Sub-sect. xix. is

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poses, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes (namely) (*inter alia*):—

"(xix.) Trial pits for mines, and other preliminary works necessary or proper in connexion with development of mines.

"(xx.) Reconstruction, enlargement, or improvement of any of those works."

Sect. 33: "Where, under a settlement, money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of this Act, they may, at the option of the tenant for life, invest or apply the same as capital money arising under this Act."

C. A. 1891 *In re* MUNDY'S SETTLED ESTATES. North, J.

addressed to "preliminary works necessary or proper in connection with development of mines," such, for instance, as making a trial pit and putting down a pump on a small scale for working, possibly, one seam which it is contemplated to work at first. Then afterwards a "reconstruction" may be required. The pump would get worn out in time, and sub-sect. xx. clearly contemplates the reconstruction of the pump, if necessary. I do not think it means that it may be "reconstructed" only if the preliminary works are still going on, and if during that time reconstruction should become necessary. In all probability before the pump was worn out, either the preliminary works would have been abandoned altogether, or those which were at first preliminary works would have become what I may call "permanent" works; and I think that the pump which I have put as an illustration might be "reconstructed" after the working of the particular seam had ceased to be preliminary, and had become a regular permanent working.

Then, in addition to "reconstruction," sub-sect. xx. speaks of "enlargement or improvement of any of those works." It might happen that, as the particular seam got worked farther away from the shaft, and a larger area of it was opened, the pump might require "enlargement," or possibly "improvement." New inventions might have been made which would render it very desirable to substitute a new pump as an "improvement" upon the existing pump. I think that the preliminary works for the working of a seam might be paid for under sub-sect. xix., and that the "reconstruction, enlargement, or improvement" of those works for the purpose of the permanent working of the same seam might be paid for under sub-sect. xx.

I have taken by way of simplicity the case of a single seam. But it seems to me that it would make no difference whether first one seam was opened, and then a second, and then a third, or whether the workings were continued in one seam only. The observations which I have made with regard to one seam would apply equally to the second and third seams in turn. I think that something more than "preliminary works" was contemplated by sub-sect. xx. Otherwise, as preliminary works are already provided for by sub-sect. xix., I do not see what the

object of sub-sect. xx. can be. But, in my opinion, the "reconstruction, enlargement, or improvement" of preliminary works is authorized by sub-sect. xx. at a later date, when they are no longer required for preliminary working, but have become permanent.

Cozens-Hardy, Q.C., and *Dibdin*, for the summons:—

The second question is, whether the proceeds of the testator's personal estate, which by his will he directed to be invested in the purchase of land, to be settled to the uses declared by the settlement, is "capital money" subject to the original settlement, which can be applied accordingly; and there is the further question, whether the money can be so applied at once, without going through the form of first purchasing land and then selling it again under the power given to the tenant for life by the Act. There is really only one "settlement": *Wolstenholme's Settled Land Acts* (1). Sect. 2 of the Act shews that a settlement may consist of several documents. It has been held that, under sub-sect. ii. of sect. 21, "capital money" may be applied in paying off a mortgage which does not affect the whole of a settled estate: *In re Chaytor's Settled Estate Act* (2). And in *In re Mackenzie's Trusts* (3), Mr. Justice *Chitty* held that money which was subject to a trust to lay it out in the purchase of land, which was to be settled, could be at once invested in accordance with the provisions of sect. 21 of the Act. In *In re Tennant* (4) your Lordship followed that decision. Sect. 33 also applies; the will may be said to be a "settlement." In *In re Lord Stamford's Settled Estates* (5), it was held by Mr. Justice *Stirling* that two different estates, settled by the same will to the same uses (with the exception of a long term of years in the one which did not exist in the other), constituted one settled estate within the meaning of the Act, and that capital money arising from the one could be applied in paying for improvements on the other.

Sidney Williams, for the trustees.

(1) 5th Ed. p. 218.
(2) 25 Ch. D. 651.
(3) 23 Ch. D. 750.
(4) 40 Ch. D. 594.
(5) 43 Ch. D. 84.

C. A. 1891 *In re* MUNDY'S SETTLED ESTATES.

NORTH, J.:—

I do not see my way to make the order. I feel great doubt about my jurisdiction to do so. The case is one in which it will certainly be desirable to take the opinion of the Court of Appeal, and I would rather leave it to them to decide. I entertain very serious doubts whether the settlement of the personal estate created by the testator's will can be treated as part of the settlement of land which was effected by the original deed of settlement. And I should be very glad also to have the opinion of the Court of Appeal upon the other point, about which too I feel some doubt, viz., whether the personal estate uninvested in land can be said to be "capital money" within the meaning of the Act. No doubt it might be made so if it were invested in the purchase of land, and then the land were re-sold under the powers of the Act. The proceeds of sale would then be "capital money" under the Act; but I doubt whether the whole of those steps, by which the money would be clearly brought under the Act, can be skipped over, and the uninvested money be treated at once as "capital money" under the Act. Mr. Justice *Chitty* in *In re Mackenzie's Trusts* (1) so decided, and in *In re Tennant* (2) I followed his decision. But I should be very glad to hear whether the Court of Appeal think that we were right in that view. In the present case a considerable sum of money is involved, and there is plenty of time to carry out what is desired. I would rather that a point of such importance should be settled by the Court of Appeal, and the way to ensure that is to refuse the present application.

The order had better recite my decision upon sub-sects. xix. and xx. of sect. 20, and then proceed, "but being of opinion that the trustees would not be justified in investing the proceeds of the personal estate in their hands in the manner proposed, refuses the application."

W. L. C.

C. A.

From this decision the tenant for life appealed. The appeal was heard on the 13th of January, 1891.

(1) 23 Ch. D. 750. (2) 40 Ch. D. 594.

Cozens-Hardy, Q.C., and *Dibdin*, for the Appellant:—

The learned Judge in the Court below held that the works proposed were improvements under sect. 25, sub-sect. xx., of the *Settled Land Act*, 1882, but refused the application because he was not satisfied (1.) that the settlement of 1872 and the will constituted one settlement; and (2.) that the money in question could be treated as capital money, as it had never been invested in land.

With respect to the first objection, the settlement made by the will expressly incorporates the terms of the settlement of 1872. The limitations are identical in both, and it is not material that the trustees of the two documents are not exactly the same persons. We therefore contend that the two settlements constitute one settlement within the terms of the *Settled Land Act*, 1882, s. 2, sub-s. 1: *In re Lord Stamford's Settled Estates* (1).

In the second place, we contend that the 33rd section of the same Act, by which it is enacted that, where under a settlement money is in the hands of trustees and is liable to be laid out in land to be made subject to the trusts of the settlement, it may be applied as capital money arising under the Act, is clearly applicable to this case, and that it is not necessary that the money should be the produce of the sale of land which has been previously settled. *In re Mackenzie's Trusts* (2), and *In re Tennant* (3), although not strictly binding on this Court, are based upon the only reasonable construction of the Act.

Sydney Williams, for the trustees of the settlement, did not oppose the appeal.

LINDLEY, L.J.:—

In this case a summons has been taken out by the tenant for life of some property comprised in a settlement made in 1872, asking in effect for a declaration that the trustees of the settlement, one of whom is also a trustee of the will, may apply certain moneys

(1) 43 Ch. D. 84. (2) 23 Ch. D. 750.
(3) 40 Ch. D. 594.

C. A. 1891 *In re* MUNDY'S SETTLED ESTATES. Lindley, L.J.

under their control in paying for some improvements in the nature of drainage works, a great part of the settled property being mineral property. Mr. Justice *North* has held in favour of the applicant to this extent. He was of opinion and has declared that the works proposed by the scheme are "improvements" within the meaning of sect. 25 of the *Settled Land Act*, and therefore, if there are any capital moneys applicable to such improvements, those capital moneys might be so applied; but he has come to the conclusion that the trustees of the settlement are not authorized to have the cost of those improvements paid out of the moneys now in question. Now, the fund in question, and out of which it is sought to have the costs of those improvements paid, is a sum of £170,000, in the hands of the trustees of the will, and that sum represents either wholly or in part the residuary personal estate of the testator *A. M. Mundy*, and the trusts on which that fund of £170,000 are held are the trusts of the settlement. That is so by the express terms of the will. [His Lordship read the clause in the will set forth above, and continued:—] Therefore we have it that this £170,000 is, by the express terms of the will, to be laid out in lands which are to be settled on the same uses and for the same trusts and purposes as the lands comprised in the settlement, and there is no possible distinction, either present or future, between the persons who are interested in the settled lands—that is, the lands comprised in the settlement—and those persons who would be interested in the lands if any were bought by the £170,000. The limitations are the same, and the persons beneficially interested must be the same now and hereafter.

Under these circumstances the question is whether there is any real difficulty in doing that which the Court is asked to do here. That turns upon an examination of the sections of the *Settled Land Act* (45 & 46 Vict. c. 38), and the two sections which are material are sect. 2 and sect. 33. [His Lordship read sect. 2, sub-sect. 1, and continued:—] Looking at those words, what is required to be found in order to constitute a settlement seems to be some instrument or instruments under which some estate or interest in land stands for the time being limited in trust for some one by way of succession. If you look at that language in

a microscopic or narrow way, you may raise this difficulty. Here is money to be laid out in land; but there is nothing in this clause respecting money so to be laid out. Can you say that there is any "land which stands for the time being limited" to the trusts of the settlement? That is a very hypercritical interpretation, which would lead to the inference that you cannot; but even if we were disposed to adopt such a narrow construction, sect. 33 shews that that would be a mistake. [His Lordship read the section, and continued:—]

Now, taking that section in connection with the one to which I have just referred, it seems to me that the Legislature has taken the trouble to say that that hypercritical interpretation ought not to prevail, and that where you have a direction that certain capital moneys shall be laid out, they are capital moneys within this Act of Parliament. That is the construction which has been placed upon them by Mr. Justice *Chitty* in *In re Mackenzie's Trusts* (1), and which was followed by Mr. Justice *North*; and it is also the view, as I understand it, adopted by Mr. Justice *Stirling* in *In re Lord Stamford's Settled Estates* (2), which was a more difficult case than either of the two preceding ones. If we look at the object of the Act, it seems to me that we are perfectly safe in going thus far—that where you have two instruments, one referring to another, as you have here, and one directing money to be laid out in land to be settled to the same uses as the other, the money is capital money for both purposes, or for either. How the case would be if we had two distinct instruments with distinct limitations under them we have not to consider. We have a case in which the will refers to a settlement in which the limitations are the same, and it appears to me that there is no difficulty in this case when you bear that in mind and construe this Act of Parliament for the purpose of carrying out the plain and clear object which the Legislature had in contemplation.

I think, therefore, that this appeal ought to succeed, and that the order made by Mr. Justice *North* should be varied by striking out the word "not" before the word "justified," and granting the application.

(1) 23 Ch. D. 750. (2) 43 Ch. D. 84.

C. A. 1891 *In re* MUNDY'S SETTLED ESTATES.

LOPES, L.J.:—

The trusts of the fund in question and the settlement are identical. The devolution is also the same. It appears to me that this case is within sub-sect. 1 of sect. 2 and sect. 33 of the Act of 1882, and this conclusion is, to my mind, in accordance with the language of the Act, and also in accordance with its spirit, and I should be very sorry to be obliged to come to any other conclusion than that at which we have arrived. I therefore entirely agree with what has been said, and that this appeal should be allowed.

KAY, L.J.:—

I quite appreciate the difficulty which the learned Judge in the Court below felt in this case. It seems to me that it is a very arguable case upon either of the points which he raised. He seems to have thought that there were difficulties in two respects: the one, whether this money could be considered capital money under the Act, because it never had been invested in land at all; and the other, whether the improvements which it was desired to make were improvements on lands which were within the settlement by which the money was settled. Those, I understand, were his difficulties. Now, the very short point that is raised by the summons is this: There was a settlement of land to legal limitations by way of use by deed in 1872, and among the provisions of that settlement there was a power by which the trustees might sell that land. Then there was a will under which this money is derived, and the will dealt also with land—but, of course, other land not in the settlement—and dealt with that land by directing it to go according to the uses and trusts of that settlement exactly, without any difference. Then it also dealt with this money which is now in question, and directed that this money should be invested in lands to be settled on the same uses and trusts, and in accordance with the powers contained in that settlement. There was this difference between the two instruments, that although one of the trustees of the settlement of 1872 was also a trustee of the will, the others were different; and, of course, when the settlement under the will came to be made it could not be made in the names of the

trustees of the settlement without their consent; so that the settlement would be made in the names of the trustees of the will, and thus it seems to me possible that the power of selling the lands which ought to be bought under the trusts of the will might be vested in persons who were different from those who had power to sell the lands contained in the settlement. So that, in one sense, and in the strictest possible sense of the word, there were two settlements, one by the deed of 1872, and the other by the will, which was a separate settlement settling other lands, and moneys to be invested in land, on trusts which were declared by reference to the settlement of 1872. But the trusts were identical: there was the same tenant for life of the two, and if the money dealt with by the will had been invested in lands he would have been tenant for life of those lands and, after his life estate had determined, all those lands, both under the will and under the settlement, would go by the same series of limitations, which are explicitly set forth in the settlement. Thus, the limitations being the same, although in the strictest sense of the word they are two settlements, are they two separate settlements for the purposes of and the intention of this Act of Parliament? No doubt a slight ambiguity arises on the terms of the section which has been referred to; but, assuming that there is an ambiguity, what is the proper mode of construing an Act of Parliament of this kind? The proper mode of construing an Act of Parliament seems to me to be to ascertain what the scope and intention of the Act of Parliament is. Is it within the scope and purpose of the Act of Parliament that where land and money are settled on identically the same trusts, that money should be applicable to the improvement of that land? It seems to me that unless it were so there would be a clear *casus omissus* in the Act of Parliament, and I do not think that any of this language can be read so hypercritically as to oblige us to come to any other conclusion. I therefore say that in this particular case which I am dealing with I have in the first place come to the conclusion, although I appreciate thoroughly the difficulties of the learned Judge, that this is capital money, both for the purposes of the trusts directed by the will, and by the settlement of 1872; and then, having come to that conclusion, it seems to

C. A. 1891 *In re* MUNDY'S SETTLED ESTATES. Kay, L. J.

me to follow that it is capital money which may be applied in making the improvements on the lands under the settlement of 1872. The will includes money as well as settled lands, and therefore it is made "capital money" under the will, and it seems to me that the proper construction of the Act of Parliament on the second point, namely, as to whether it is applicable to the purposes of improvement of lands under the settlement, is to hold that the true scope and object of the Act of Parliament is to make it so applicable, and I therefore agree with the rest of the Court.

Solicitor: *H. B. Wade*, agent for *Fowler, Warwick, & Neale, Leicester.*

M. W.

C. A. 1891 *Jan.* 15, 16.

BELLAMY *v.* DEBENHAM.

[1889 B. 2715.]

Vendor and Purchaser—Contract in Letters—Subsequent Correspondence—Want of Title—Rescission of Contract—Damages.

On the 17th of April, 1889, the Defendant's agent wrote to the Plaintiff's agent offering £800 for a house of the Plaintiff. On the 25th the Plaintiff's agent, by his authority, wrote, accepting the offer, and stating that possession would be given at Midsummer. The Plaintiff's solicitors sent to the Defendant's solicitor a draft contract containing special conditions, which the Defendant's solicitor struck out. On the 14th of May the Plaintiff's solicitors wrote to the Defendant's solicitor: "We cannot consent to all your alterations, which, in fact, make the contract almost an open one." On the 17th the Defendant's solicitor sent back the draft with a letter stating that he could not advise his client to go on with the negotiations. The Plaintiff's solicitors sent back the draft with some variations and with the abstract of title, from which it appeared that the land was enfranchised copyhold, and that the vendor had not the mines. On the 20th of May the Defendant's solicitor wrote to the Plaintiff's solicitors that, as the Plaintiff had not the mines, he could not advise his client to go on with the matter. The Defendant accordingly refused to proceed. The Plaintiff negotiated with the lord of the manor for the purchase of the mines, but did not obtain a conveyance of them till September. In the meantime, on the 22nd of June, 1889, the Plaintiff commenced this action for specific performance or damages. *North*, J., held, that the letters of April constituted a contract, and that it was not affected by the subsequent correspondence; but that, as the Plaintiff had

occasioned the difficulty by insisting on stipulations to which he was not entitled, the action must be dismissed. The Plaintiff appealed.

Held, by the Court of Appeal, that, as in May, 1889, the vendor had not power to convey the mines, nor power to compel a conveyance of them from any other person, the purchaser was entitled, upon discovering this, to rescind the contract, though the time to be allowed for completion had not expired, and that specific performance could not be decreed:

Held, further, that the Plaintiff could not sustain a claim for damages for breach of contract, since he was not, on the 24th of June (which must be treated as the end of the time allowed for completion), in a position to give the Defendant such a conveyance as the Defendant was entitled to.

Whether, if on the 24th of June the Plaintiff had been able and willing to give the Defendant a proper conveyance, he would not have been entitled to damages for the Defendant's breach of contract, *quære*.

THIS was an appeal by the Plaintiff, a vendor, from a judgment of *North*, J., dismissing without costs his action for specific performance or damages (1).

The contract was sought to be made out from the following letters:—

April 17, 1889. Defendant to *Bridgman*, Plaintiff's agent:—"*Effingham Place.* I am prepared myself to offer you £800 for the freehold, with possession at Midsummer. I am assuming, of course, that the title is satisfactory, and that all the ground now occupied with the house is included."

April 18. *Bridgman* to Defendant:—"*Effingham Place.* I am obliged by your letter of the 17th instant, and am instructed by Mr. *Sanders* (another agent) to accept your offer of £800 for the freehold therein contained, subject to the owner's ratification, of which he entertains no doubt, and for which he will at once apply."

April 25. Defendant to *Sanders*:—"*Effingham Place.* I have no wish to press you unduly, but I cannot allow my offer to stand over indefinitely, and . . . . if I do not hear that the owners accept it before 5 P.M. to-morrow, I must consider myself at liberty to withdraw it."

April 25. *Sanders* to Defendant:—"*Effingham Place.* I am pleased to inform you the owner confirms the sale above to you for £800. Possession to be given at Midsummer next. Kindly

(1) 45 Ch. D. 481.

C. A. 1891 BELLAMY v. DEBENHAM.

let me know if the contract shall be prepared in your name or that of the committee."

The Defendant having replied that the contract must be in his name, a draft contract was sent to his solicitor, who struck out various special conditions contained in it, and returned it as altered to the Plaintiff's solicitors, who, on the 14th of May, wrote to Defendant's solicitor: "We return draft agreement. We cannot consent to all your alterations, which, in fact, make the contract almost an open one."

On the 17th the Defendant's solicitor wrote to the Plaintiff's solicitors, returning the draft, and saying: "I am sorry I cannot advise Mr. *Debenham* to go on with the negotiation."

The Plaintiff's solicitors made some alterations in the draft, and sent it back to the Defendant's solicitor, with the abstract of title. The Defendant's solicitor, on looking at the abstract, discovered that the property was an enfranchised copyhold, and that the minerals were reserved to the lord, and on the 20th of May wrote a letter, saying: "I see there is this fatal objection—that your client has not the mines and minerals. . . . . I am very sorry not to do business, but I cannot possibly advise my client to go on with the matter. I return the draft contract and abstract."

On the 25th of May the Plaintiff's solicitors wrote to the Defendant's solicitor a letter, saying: "The rights of the lord of the manor are, we understand, worthless; but, to avoid any question with your client, Mr. *Bellamy* has agreed to purchase them, so that we shall be able to convey the fee simple on the 24th of June, as agreed. Please return the contract (inclosed) approved at your early convenience."

On the 27th the Defendant's solicitor wrote to the Plaintiff's solicitors: "I take leave to remind you that I wrote to you on the 17th instant, that I could not advise my client to go on with the negotiation, and I so informed him, and he has given up all idea of the purchase. He is away from home, and I really cannot reopen the matter. I return the draft."

The Defendant, persisting in this refusal, the present action was commenced on the 22nd of June, 1889.

The statement in the letter of the 25th of May, that the Plaintiff had agreed to purchase the rights of the lord of the manor, was not correct, the Plaintiff having only obtained a verbal promise from the lord to sell them, and no price having been fixed. On the 3rd of June, 1889, the Plaintiff's agent, Mr. *Bridgman*, wrote to the agent of the lord of the manor a letter which, after referring to the property and its enfranchisement, proceeded: "The present owner, Mr. *Bellamy*, is desirous of acquiring the reserved rights, if they can be obtained by payment of such a sum as ten guineas, with the attendant expenses of conveyance, and a small fee to yourself. I need hardly say there are no minerals known to exist. I shall be glad to hear at your earliest convenience what sum would be accepted, and how long the conveyance would take."

The agent replied, on the following day, that the lord was out of *London*, but the agent would try to see him.

On the 8th, *Bridgman* wrote again to the agent, pressing for an early reply. Ultimately, on the 18th of June, the agent wrote to Mr. *Bridgman*: "I have seen Sir *G. Prescott*" (the lord); "he agrees to the minerals being acquired on the payment of £10 10*s*. Please communicate with Mr. *Alderson*, to complete the conveyance. My fee will be £2 2*s*."

On the 19th, Mr. *Bridgman* replied: "I am obliged by your letter of yesterday, and telegram also, and have sent them to my client, whose solicitors will doubtless communicate with Mr. *Alderson* at once."

The conveyance of the minerals to the Plaintiff was completed on the 2nd of September, 1889.

Mr. Justice *North*, on the 15th of July, 1890, decided that the letters of April, 1889, constituted a complete contract, which was not affected by the subsequent correspondence. His Lordship, however, considered that the Plaintiff had so put himself in the wrong by insisting on the insertion in the formal contract of terms to which he had no right, that it would not be fair to give him specific performance, and that the action must be dismissed without costs. His Lordship declined to decide whether the Defendant had effectually rescinded the contract on the ground of the want of title to the minerals; for that, if he were to decide

C. A. 1891 BELLAMY v. DEBENHAM.

that point in the Defendant's favour, he still should not give the Defendant any costs.

Napier Higgins, Q.C., and *Medd*, for the Appellant:—

The learned Judge in the Court below held, in our favour, that there was a complete contract between the Plaintiff and the Defendant in the two letters of the 17th and 18th of April, 1889; and he further held that the Defendant had no power to repudiate the contract on the 27th of May. We contend that his conclusion was right on both these points, and that he ought not to have refused the Plaintiff specific performance of the contract. There was nothing in those letters, or in the previous correspondence, to shew that the parties intended to leave any question for future negotiation. In this respect the case differs from *Hussey* v. *Horne-Payne* (1) and similar cases. The contract was intended to be final, and was complete both at law and in equity; therefore no subsequent negotiations about fresh points of difference could affect it without the consent of both parties: *Rossiter* v. *Miller* (2); *Bolton Partners* v. *Lambert* (3). It would be very dangerous to hold that, where a clear contract has been entered into by letters a subsequent discussion of points by way of variation of or addition to the contract can dissolve the contract. We admit that the subsequent letters may be such as to shew that the parties did not intend the former letters, at the time when they were written, to constitute a contract. But there is nothing of that kind here. In order to negative a contract it must be shewn that the points afterwards raised were in the minds of the parties when the earlier letters were written; so that the letters which are relied on as forming a contract did not dispose of the whole matter about which the parties were bargaining.

That being so, the Defendant had no power to repudiate the original contract, although the Plaintiff may have endeavoured to introduce fresh terms. If at the time fixed for the completion of a contract for sale the vendor is unable or unwilling to complete, the purchaser may withdraw from the contract, but not before. In the present case, the 24th of June was the day fixed

(1) 4 App. Cas. 311. (2) 3 App. Cas. 1124.
(3) 41 Ch. D. 295.

for completion, for that was the day on which the purchaser was to be let into possession. Before that day the Plaintiff had arranged with the lord of the manor to convey the minerals to him, and he was, therefore, able to make a perfect title on that day to the property sold.

[KAY, L.J., referred to *In re Head's Trustees and Macdonald* (1).]

We admit that if a purchaser discovers that the vendor, when he made the contract, had no right to the property—that he was selling on speculation an estate which he hoped to acquire before the day of completion—he may repudiate the contract directly he discovers the true state of the case. But if the objection relates to some collateral point in the title, or to some small portion of the property, the vendor has till the day of completion to make the title good. Here the minerals under the property were of very small value, and the purchaser knew all along that the land was enfranchised copyhold, and that there might be a question about the minerals. Therefore the alleged repudiation on the 27th of May was nugatory: *Wylson* v. *Dunn* (2); *Chamberlain* v. *Lee* (3); *Hoggart* v. *Scott* (4); *Weston* v. *Savage* (5); *Hatten* v. *Russell* (6).

We do not know of any case where rescission before the time for completion has been allowed, unless it can be shewn that the performance has become impossible.

[KAY, L.J., referred to *Hoare* v. *Rennie* (7); and LOPES, L.J., to *Hoggart* v. *Scott*.]

In *Hoggart* v. *Scott* the vendors had no title to sell; they were strangers to the property at the time they made the contract.

[KAY, L.J.:—If a vendor has no power to sell, is not the purchaser entitled to rescind as soon as he discovers the fact?]

That principle has been applied before the time fixed for completion in two classes of cases. The type of one class is *Brewer* v. *Broadwood* (8), where it was impossible that the interest

(1) 45 Ch. D. 310.
(2) 34 Ch. D. 569.
(3) 10 Sim. 444.
(4) 1 Russ. & My. 293.
(5) 10 Ch. D. 736.
(6) 38 Ch. D. 334.
(7) 5 H. & N. 19.
(8) 22 Ch. D. 105.

C. A. 1891 BELLAMY v. DEBENHAM.

contracted to be sold should be got. The other is *In re Head's Trustees and Macdonald* (1), where there was an attempt to substitute a different set of vendors.

If the Court should not think fit to grant specific performance, the Plaintiff is entitled to damages. We suffered special loss by the removal of the tenant in order that possession might be given up to the purchaser.

Cozens-Hardy, Q.C., and *MacSwinney*, for the Respondent:—

We will first take the question of rescission.

[LINDLEY, L.J.:—Our doubt is whether the reservation of mines in the present case is sufficiently material to justify rescission.]

In *Upperton* v. *Nickolson* (2), which related to a piece of land near *Brighton*, it was held that the reservation of mines was not a matter for compensation, but a fatal objection to the title. The purchaser, therefore, as soon as he discovered it, could rescind the contract. [They were then stopped by the Court.]

Napier Higgins, in reply:—

The question of rescinding before the time for completion was not argued in *Upperton* v. *Nickolson*. The title there was bad at the time when the matter came before the Court.

[LINDLEY, L.J.:—I do not see that you were able to make a title to the minerals at the time fixed for completion. I think you had not then even an equitable title to them.]

We had a good contract for them, and if the Defendant had not delayed us by refusing to perform his contract, we should have obtained a conveyance before the time for completion. A want of title to a small part of the estate is not a ground for rescinding, and here the mines are a most unimportant part.

[*Cozens-Hardy*, Q.C., referred to the last sentence of the judgment in *Upperton* v. *Nickolson* (3).]

That is a mere *obiter dictum*. *Murrell* v. *Goodyear* (4), where

(1) 45 Ch. D. 310.
(2) Law Rep. 6 Ch. 436.
(3) Law Rep. 10 Eq. 228.
(4) 1 D. F. & J. 422.

it is laid down that, if a vendor can perfect the title, he is entitled to enforce the contract, is much more to the point.

LINDLEY, L.J.:—

This is an appeal by a vendor who seeks specific performance of an agreement alleged to have been entered into by the Defendant for the purchase from the Plaintiff of a house at *Cheshunt*, and asks in the alternative for damages if he cannot obtain a decree for specific performance.

The contract between the parties is to be found, if at all, in a series of letters which have been read and carefully considered by all of us. Having regard to the point to which I will allude presently, I do not think it necessary to spell through those letters for the purpose of seeing whether they do or do not amount to a concluded agreement. I have, to say the least, very considerable doubt about it. Looking at the whole correspondence, which we are bound to do in order to see whether the two or three letters fixed upon by the vendor amount to a concluded contract, I think that having regard to the vendor's letter of the 14th of May, there is very considerable doubt about that point. I shall, however, assume that the letters do amount to an agreement for the sale and purchase of this property, and I will consider whether on that assumption the Plaintiff is entitled to specific performance, and if not whether he is entitled to damages for breach of contract.

The position of affairs is this. The contract, if there was one, was a contract for the sale of this house at the price of £800, the house being treated as freehold, since there is nothing to the contrary mentioned in any of the letters. There was in terms no day fixed for completion, but the contract was made in April, 1889, and the 24th of June was the time fixed for the delivery of possession. Now, having regard to the nature of the property, to the time which had elapsed, and to that stipulation about possession, it appears to me that the 24th of June was the end of a reasonable time for completing the contract. I do not think that any Judge would say that a longer time for completion ought to be allowed.

Now the real truth was that this was not an ordinary freehold

C. A. 1891 BELLAMY v. DEBENHAM. Lindley, L.J.

house. It was a house built upon a piece of land containing about a quarter of an acre which was formerly copyhold, and which had been enfranchised. Under the *Copyhold Acts*, the mines, minerals, clay, gravel, &c., were reserved to the lord of the manor, and did not belong to the vendor. The Defendant, it is said, was a person well acquainted with the locality. He is an old auctioneer, whose name is familiar to us all, and it is said that he knew this was enfranchised land. He probably did know that; but that would not acquaint him with the fact that the minerals had not been acquired by the vendor, and there is nothing to shew that he knew that he was buying anything else than an ordinary freehold house. It is plain that the vendor had not got what he contracted to sell. The purchaser does not see that until the abstract is sent in, and when it is sent in he says, "I shall not complete." The Defendant's solicitor in his letter of the 20th of May says, that as the Plaintiff cannot give his client the mines and minerals, he cannot advise his client to complete, and that advice is communicated to the client and adopted by him. It appears to me, therefore, that there was on the 20th of May a plain repudiation on the part of the Defendant of all liability to complete, and he has never flinched from that position.

Now, what effect has that upon the Plaintiff's right to specific performance? I shall not go through the authorities, but shall content myself by saying, that having regard to the cases of *Hoggart* v. *Scott* (1), *Forrer* v. *Nash* (2), *In re Head's Trustees and Macdonald* (3), and *Weston* v. *Savage* (4), the purchaser was justified in taking up that position and saying, "I will not complete.' That appears to me to be a complete answer on the case of specific performance.

Now, as to damages, I am not sure that the repudiation on the 20th of May is by itself an answer to the Plaintiff's claim for damages. The Plaintiff had, if I am right in the assumption I have made, a time allowed for completion which did not expire until the 24th of June, and if he had been ready and willing on the 24th of June to complete his contract and to give to the

(1) 1 Russ. & My. 293.
(2) 35 Beav. 167.
(3) 45 Ch. D. 310.
(4) 10 Ch. D. 736.

Defendant such a conveyance as the Defendant was entitled to, I am not prepared to say that the Defendant would not have been liable to damages if he refused to complete.

But what are the facts? The facts are, that on the 24th of June the Plaintiff had no more got the property than he had in April. He had begun to negotiate for it; but he did not get it until September. If you look at this action, therefore, as an action by the vendor for damages for non-completion, the purchaser's defence is, "You the vendor were not in a position at the time for completion to give me that which I bargained for." That is a complete defence to an action at law for damages.

It appears to me, therefore, that both the equitable remedy and the legal remedy fail, and the appeal ought to be dismissed.

LOPES, L.J.:—

With regard to the question whether there was here a concluded agreement, I express no opinion. Like my Brother *Lindley*, I have doubts in my mind upon the matter; but I assume, for the purposes of this decision, that there was a concluded agreement.

Then the question arises, Was there a repudiation of that agreement?

It has been said that the letters which are relied upon as supporting that repudiation are not sufficient to support it. I think, looking at the letters of the 17th and the 20th of May, the Defendant did repudiate the contract. But the question arises whether he had any power to repudiate or to rescind. I am dealing now with the action for specific performance. The state of things at that time was this, that the vendor had not a freehold title to the property which the Defendant had agreed to purchase. The mines and minerals under the house and the lands did not belong to the vendor, but were reserved to and vested in the lord of the manor. There was therefore, it appears to me, an absolute want of title to a material part of the subject-matter of the Defendant's purchase. That being so, had he a right to repudiate the contract? It appears to me that the authorities on this subject are clear, and I will read the end

C. A. 1891 BELLAMY v. DEBENHAM. Lopes, L.J.

of the judgment in the case of *Forrer* v. *Nash* (1) which appears to me to be very much in point. The learned judge says (2) "I am of opinion that when a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may say, 'I will have nothing to do with it.' The purchaser is not bound to wait to see whether the vendor can induce some third person (who has the power) to join in making a good title to the property sold." That appears to me entirely to cover this case. There are other decisions to the same effect, viz.: *Hoggart* v. *Scott* (3); *In re Head's Trustees and Macdonald* (4); *Weston* v. *Savage* (5), and other cases which have been referred to during the argument. There appears, therefore, to me to be a complete answer to the action for specific performance.

But then it is said by Mr. *Napier Higgins*, "Yes; but I have a right to damages; there has been a breach of contract by the Defendant; I am entitled to sue him for non-completion on the 24th of June." Without expressing any opinion whether such an action would lie—and I have very grave doubts in my own mind whether it would—it seems to me that the answer to Mr. *Napier Higgins*' contention is perfectly clear. The Plaintiff would be non-suited. In order to maintain that action, he would be compelled to prove that on the 24th of June he was in a position to make a good and valid conveyance of this property; whereas, as a fact, we know perfectly well from the evidence that it was not until a much later period that he acquired those mines and minerals which alone would enable him to fulfil his contract and to convey that which he had contracted to convey to the Defendant.

I think, therefore, that on all grounds, the decision of the learned Judge below is right, although I am not prepared to say that I come to that conclusion on the same grounds, nor am I prepared to say that I altogether follow many of the observations made by the learned Judge in the Court below.

(1) 35 Beav. 167.
(2) Ibid. 171.
(3) 1 Russ. & My. 293.
(4) 45 Ch. D. 310.
(5) 10 Ch. D. 736.

KAY, L.J.:—

C. A. 1891 BELLAMY v. DEBENHAM.

I entirely agree with the other Lords Justices. I have followed closely what Lord Justice *Lindley* said in his judgment. I am not able to add to it, and I agree with every word of it. I therefore shall content myself by saying that I am not satisfied that there was a complete contract in this case; but, assuming that there was, I think that it has been validly rescinded, and that no claim either for specific performance or for damages can possibly be sustained. We are resting our judgment upon different grounds from those relied upon by the learned Judge in the Court below; but that will make no difference as to the costs. The appeal must be refused with costs.

Solicitors: *R. W. Childs, Batten, & Harling*; *T. G. Bullen.*

H. C. J.

In re DICK. LOPES *v.* HUME-DICK.

C. A. 1891 *Jan.* 16.

[1890 D. 1983.]

Investment of Trust Funds—Instrument giving no Power to vary Investments—Power to vary existing Securities—Trust Investment Act, 1889 (52 & 53 *Vict. c.* 32), *s.* 3.

A testator bequeathed his residuary estate to trustees upon trust to convert it and invest it in the public stocks or funds of *Great Britain*, and to apply it in the purchase of lands to be settled, and in the meantime to pay the income to the persons for the time being entitled in possession under the limitations of the settlement. No power to vary securities was given. The trustees had in hand large amounts of Government stocks arising from the residuary estate, and purchased long before the *Trust Investment Act*, 1889, came into operation:—

Held (reversing the decision of *Stirling*, J.), that under the *Trust Investment Act*, 1889, sect. 3, the trustees had power to sell these stocks for the purpose of investing the proceeds in other stocks, funds, or securities authorized by that section.

The words at the end of sect. 3, "to vary any such investment," are not to be confined to investments made under the power given by the Act, but extend to any investment, whenever made, upon any such stocks, funds, or securities as are mentioned in the section.

QUINTIN DICK, by will dated the 30th of August, 1844, gave all his real and personal estate to his executors and trustees,

C. A. 1891 — *In re* Dick. Lopes v. Hume-Dick.

upon trust to permit his plate, books, pictures, and jewels to be used and enjoyed as therein mentioned, and to convert such remaining part of his residuary real and personal estate as should not consist of money or securities for money or Government securities into money, "and to invest the same in the public stocks or funds of *Great Britain* in their names, and to stand possessed of the same and of all other my residuary estate upon trust," with such consent as therein mentioned to invest the same residuary estate, or such part or parts thereof as they might deem eligible or convenient, in the purchase of freehold lands of inheritance in *Ireland*, to be vested in the trustees upon the trusts, and to the uses therein mentioned, being limitations in settlement. And the testator directed that, till his residuary estate should be so laid out, the trustees should pay and apply all income arising from the same or such part thereof as should not be so laid out to and for the use of such person or persons as should from time to time be entitled under the aforesaid limitations to the possession or enjoyment of the real estates to be purchased.

The will contained no power to vary investments.

The testator died on the 26th of March, 1858.

Some estates in *Ireland* had been bought; but the trustees had in hand large sums of Government stocks, forming part of the residuary estate.

The tenant for life wished the trustees to sell enough of these stocks to raise £106,900, and to invest that sum on mortgage of freehold estates. The trustees took out an originating summons to obtain the opinion of the Court whether they had power to do this. Mr. Justice *Stirling*, in Chambers, decided that they had not. The tenant for life appealed.

Beale, Q.C., and *Farwell*, for the Appellant:—

We contend that under the *Trust Investment Act*, 1889, the trustees have power to make this change of investment. It is contended on the other side that the words, "any trust funds in his hands," must be held to apply to money only, and not to authorize the sale of a security on which money is already properly invested. We submit that the words do not cut down

the power so as to make it extend to money at a bank which is unsecured, and not to money due on a mortgage which is secured.

[LINDLEY, L.J. :—May not the words mean trust property which is in such a state that it is the duty of the trustees to invest it, which would exclude moneys already properly invested?]

The concluding words of sect. 3, which gives power to vary investments, point at a wider construction. The case of *In re Warde* (1) is against us so far as it bears on the point; but the Act 22 & 23 Vict. c. 35, s. 32, under which it was decided does not contain any power to vary investments, and we submit it ought not to be treated as deciding the present question. *Waite* v. *Littlewood* (2), under the same Act, is in our favour; but the report is so meagre that we do not rely much upon it. *In re Cooper's Trusts* (3) is cited in *Lewin* on Trusts (4) as an authority for the proposition that where a trustee has a choice of investments, a power to vary investments is to be implied.

[FRY, L.J. :—It appears to me a very strong position to say that because there is originally a choice, there is a continuing power to vary.

KAY, L.J. :—So it does to me.]

In the case of *In re Clergy Orphan Corporation* (5) Vice-Chancellor *Malins* held, that under 23 & 24 Vict. c. 38, s. 11, the trustees of a private Act which gave them no power to vary securities had authority to sell out existing securities for the purpose of investment in the new modes authorized by the Act. That case is very similar to the present. The only case under the present Act is *In re Manchester Royal Infirmary* (6), where *North*, J., made remarks unfavourable to our contention; but it can hardly be said that there was a decision to that effect. The head-note appears to go beyond the actual decision. The final words of sect. 3 of the present Act give power to vary any investment, and not merely an investment made under the

(1) 2 J. & H. 191.
(2) 41 L. J. (Ch.) 636.
(3) W. N. (1873), p. 87.
(4) 8th Ed. p. 460.
(5) Law Rep. 18 Eq. 280.
(6) 43 Ch. D. 420.

C. A. 1891 *In re* DICK. LOPES *v.* HUME-DICK.

powers of the Act. The right way of dealing with the Act, having regard to sect. 6, is to treat sect. 3 from the beginning of sub-sect. (*a*) to the end as incorporated in every instrument creating a trust unless that instrument contains an express prohibition. The Act is an enabling statute, and to be construed liberally.

Hornell, for the trustees, submitted the point to the Court.

Cozens-Hardy, Q.C., and *E. Beaumont*, for the Remainderman:—

We say that *In re Warde* (1) is good law and applies to the present case. Sect. 3 only comes into operation where a trustee has trust funds in his hands in a shape requiring investment. As to the power to vary, it is only a power to vary "any such investment," *i.e.*, any investment made under the power of sect. 3.

[FRY, L.J.:—Why may it not mean "any investment in any of the stocks, funds, or securities hereinbefore mentioned"?]

That is not the natural meaning of the words—where power is given to a trustee to invest and then to vary "such investment." If the Legislature had intended to give a power to vary investments made before the passing of the Act, it would have said so, or at all events would not have followed so closely the language of an Act under which it had been held in *In re Warde* that there was no power to sell out existing investments. Suppose a sum of a particular stock specifically bequeathed in settlement without any power to change the investment, it is not to be presumed that the Legislature intended to enable the trustees to defeat the testator's intention by selling it and investing the proceeds in some other way.

LINDLEY, L.J.:—

The question raised on this appeal is one of very great importance to trustees. The state of facts with which we have to deal is this. Under a will made in 1844 certain trustees have considerable sums of money properly invested in their names in Government securities according to the trusts of the will. They have power under the will to sell out those investments and

(1) 2 J. & H. 191.

invest the proceeds in land, but they have no power under the will to vary the securities upon which they were empowered to invest their trust moneys.

That being the state of things, the Government in 1888 reduced the dividend payable upon Government securities, and in consequence of that reduction it was considered by the Legislature to be, if not necessary, at least desirable, to extend the powers which were formerly possessed by trustees as regards the investment of trust moneys. That being the general object of the *Trust Investment Act*, 1889 (52 & 53 Vict. c. 32), we have now to construe it and to apply it to the circumstances of the present case. Sects. 3 and 6 are the important sections. I will begin with sect. 6: "This Act shall apply as well to trusts created before as to trusts created after the passing of this Act, and the powers hereby conferred shall be in addition to the powers conferred by the instrument, if any, creating the trust." That is a section which is somewhat remarkable, because it says in plain language that the Act shall apply to trustees who hold moneys under trusts created before its passing. The object, no doubt, was to redress the inconvenience and hardship which, if there were no such Act as this, would be likely to arise from what the Legislature had done as to Government securities. The Act then being made retrospective, and, as I think, justly retrospective, sect. 3 says: "It shall be lawful for a trustee, unless expressly forbidden by the instrument (if any) creating the trust, to invest any trust funds in his hands in manner following, that is to say." Now, the expression "trust funds in his hands" probably means trust moneys requiring investment. The trustee is then authorized to invest such moneys in a great variety of investments running down from (*a*) to (*o*), "and also from time to time to vary any such investment." This last expression appears to me to be of the utmost importance. There were no such words in *Lord St. Leonards' Act* (22 & 23 Vict. c. 35) under which *In re Warde* (1) was decided, and without saying whether that decision was right or wrong (a matter which now concerns nobody) it seems to me that *In re Warde* has nothing to do with the construction of the statute now before us. It is contended

(1) 2 J. & H. 191.

C. A. 1891 *In re* Dick. Lopes v. Hume-Dick. Lindley, L.J.

that the words are to be read in this sense—that the power to vary shall only apply to cases in which money has been invested under the powers of this Act. That is one possible construction. Another possible construction is this, that the words give power to vary any of the investments enumerated in sect. 3, sub-sects. (*a*) to (*o*), whether made under the Act or not. The second construction appears to me to be most in accordance with the objects which the Legislature had in view in passing that Act. There is no authority against that construction except the intimation of opinion which there clearly was on the part of Mr. Justice *North* in the *Manchester Infirmary Case* (1). I think that he took too narrow a view, and that it would be most unfortunate for all trustees and their *cestuis que trust* if we were to confirm it. I am of opinion that a wider view ought to prevail, and that this appeal ought to be allowed.

Fry, L.J.:—

I am of the same opinion. We must approach the consideration of this statute with the knowledge that from the year 1859 down to 1889, that is a period of thirty years, various measures had been passed by the Legislature to enlarge the powers of trustees with regard to their investments. To remove the increasing difficulty found by trustees in obtaining proper investments was no doubt the object and motive of that legislation. We must, therefore, look upon this as an enabling statute, and, as Lord Justice *Lindley* has already pointed out, it is an enabling statute not only in respect of trusts created after the passing of the Act, but also with regard to those created before the passing of the Act. Now, bearing that in mind, I approach the construction of the 3rd section, which is the most material one, and we find that it enables trustees, unless expressly forbidden by the instrument (if any) creating the trust, to invest any trust funds in their hands in the manner which is mentioned, and gives a power of selection from among a series of trust funds. Now, pausing there, it seems to me that the words, "to invest any trust funds in his hands," indicate moneys which are in the hands of trustees for investment, and do not apply to sums

(1) 43 Ch. D. 420.

already invested. But at the end of the section are the words, "And also from time to time to vary any such investments." Such as what? The Legislature has not told us. It seems to me that the words must mean any such investments as are hereinbefore mentioned, or any such investments as shall hereafter be made under the power conferred by this section. Which of the two things should it be held to mean? In my opinion, the former is the true meaning, and the concluding part of the section should be read as if the words "any such investment" were followed by the words "as hereinbefore mentioned." It therefore applies to investments of a specified character, whether the investment be made by the testator during his lifetime or by the trustees after his death, and at whatever time the investment was made the power of variation applies. I have been led to that conclusion in the first place by the view that I take of the object of the Act, which is to enlarge the powers of trustees as to the choice of investments. But there are other considerations which incline me to the same conclusion. In the first place, it would be very remarkable if, where a testator left parliamentary stocks without giving any power of variation, and also left cash which was to be invested by the trustees in parliamentary stock, the trustees were to have power to vary the portion of the stock which was purchased after the Act, but no power to vary the portion purchased before. I think that is an inconvenient conclusion, and one to which we ought not to come unless we are driven to it. But, again, the fact that the Act applies to documents existing at its passing seems to me to be very strong to shew that it must apply to enable a variation to be made of the stocks which have been invested under the powers of those existing documents, because otherwise the operation of the power of selection would be very much narrowed. Again, the 6th section provides that "the powers hereby conferred shall be in addition to the powers conferred by the instrument, if any, creating the trust." It consequently follows that the true mode of construing this power is, as was said by Mr. *Farwell*, to read it into the will, and then the power to vary investments applies to all the investments made under the will, whether made under the Act of Parliament or not, unless they are excluded by the express language of the will.

C. A. 1891 — *In re* Dick. Lopes v. Hume-Dick.

For these reasons, I think that the view of Mr. Justice *North*, which has been followed by the learned Judge, was too narrow, and that the power to vary should be held to be applicable to the funds in question.

Kay, L.J.:—

It seems to me that there is considerable ambiguity as to the meaning of this Act of Parliament. For my part, I cannot wonder that the learned Judge should arrive at the conclusion which he did, looking at the existing decisions and the words of the Act; but, upon the whole, I think the true mode of dealing with an ambiguity of this kind is to consider what was the scope and intention of the Act of Parliament, and to construe the words in such a manner as will best carry out its general purpose and object. The words of the Act have been referred to, and I will not read them again, and certain illustrations have been given of what would be the consequence of reading the power of variation of investments and of applying it only to investments made under the Act. It is extremely easy to put difficult cases with regard to either view of the construction. The power to vary "such investments," even if you read the whole section into the will, cannot go beyond such investments as are mentioned in sect. 3. It is quite possible, then, that there might be under the will or settlement investments of descriptions not mentioned in sect. 3, and, if the will or settlement contained no power to vary, they would not be variable under the power given in this section. That is a difficulty which would still remain even after the construction which the Court has put upon it. However, it seems to me that the object of this statute, speaking generally, being to enlarge the powers of trustees even under existing trusts as well as under trusts created in future, it is more consistent with that object to give the wider interpretation to this power of variation than the narrower one. I, therefore, prefer to say that this power of varying investments means varying such investments as are mentioned in sect. 3, whether those investments are made under the power given by the Act, or whether they were made by the settlor or testator himself, or whether they have been made by the trustees since the trust has arisen. If

the investments so made, whenever made, are within any of the descriptions from (*a*) to (*o*) in this section of the Act, then I think the words at the end of it give power to vary such investments. For these reasons, I agree with the other members of the Court of Appeal.

I am afraid our decision will subject trustees to increased importunities from tenants for life. But trustees must bear in mind that the duty of a trustee when he is called upon to change an existing investment is an important duty, and that it would not be a proper exercise of his discretion to change the investment merely for the sake of increasing the income of the tenant for life, if in doing so he diminishes the security of the capital fund.

The order declared that the trustees "have power" to make the proposed change of investment, the Court objecting to the expression "are at liberty," as leading to an inference that the Court sanctioned the change of investment, whereas its propriety was not before them.

Solicitors: *Arnold & Henry White; Munns & Longden.*

H. C. J.

C. A.
1890
NORTH, J.
July 3, 8, 9, 10;
Aug. 6.
C. A.
1891
Jan. 14, 15, 17, 21.

ATTORNEY-GENERAL *v.* MORGAN.

[1888 A. 589.]

Royal Mine—Rights of Crown—"Gold Mine"—Gold mixed with base Metals—1 *Wm. & M. c.* 30, *ss.* 1, 2, 3, 4 [*Revised Ed. Statutes, vol. ii., p.* 9]—5 *Wm. & M. c.* 6, *ss.* 2, 3 [*Revised Ed. Statutes, vol. ii., p.* 29].

The relaxation in favour of the subject of the Royal prerogative in respect of Royal mines, which was effected by the Acts 1 Wm. & M. c. 30 and 5 Wm. & M. c. 6, does not apply to a mine which is worked simply as a gold mine, even though the gold is found mixed with the ores of the baser metals mentioned in the Acts, if the quantity of the baser metals is so small as to be valueless for the purpose of working.

In such a case the ancient prerogative of the Crown remains unaffected, and the mine cannot be worked by a subject, even on his own land, without the license of the Crown.

The decision of *North, J.*, affirmed.

Held also, by *North*, J., that in cases to which the Acts apply, the Crown cannot be called upon to exercise the right of pre-emption given to it by the Act until the ore has been "washed and made clean and merchantable." It is not sufficient to offer the Crown quartz rock in the rough just as brought up from the mine.

TRIAL of action brought by the Attorney-General on behalf of the Crown against Mr. *Pritchard Morgan*, claiming an injunction to restrain the Defendant, his agents, servants, and workmen, from raising, working, or getting, and from selling or removing, or causing or permitting to be removed, from a mine known as the *Gwynfynydd* mine, near *Dolgelly*, in *Merionethshire*, or the lands and premises occupied therewith, or from certain other lands in the same county (specified by name), or from any other lands in that county, any gold or gold ore, silver or silver ore, or quartz, or other substances containing gold or silver, the produce of the said mine or lands, without the license of the Commissioners of Her Majesty's Woods, Forests, and Land Revenues. The Plaintiff also claimed an account of all gold or gold ore, silver or silver ore, and of all quartz rock or other substances containing gold or silver, got by the Defendant from the said mine or lands, or any of them, since the 31st of December, 1887, and payment of the value thereof to the said Commissioners on behalf of Her Majesty.

The writ in the action was issued on the 26th of April, 1888, and the statement of claim was delivered on the 10th of January, 1889. It contained allegations to the following effect: The Defendant was, and had been for some time previously to the commencement of the action, working the *Gwynfynydd* mine, situate on a farm of which Mr. *Chidlaw Roberts* was reputed to be the owner, and the Defendant had recently commenced similar gold-mining operations on the other lands in question. Some thousands of tons of quartz had been raised by the Defendant, part of which had been crushed, and the rest was stacked awaiting treatment. A considerable quantity of gold had already been extracted and removed from the works, and the operations were still proceeding. Welsh gold was always found mixed with a certain quantity of silver. The mines so being, and about to be, worked by the Defendant were Royal mines, and as such were, with all gold and silver found therein, the property of Her Majesty the Queen in right of her Crown. The *Gwynfynydd* gold mine had been worked in 1864 and 1870, and royalty on the gold then obtained was paid to the Crown. No license to work any part of the mines in question had been granted by the Crown to the Defendant, or to any person under whom he claimed. Negotiations had been going on between the Defendant and his lessors and the Commissioners for a Crown license to work the mines on payment of a royalty, and pending those negotiations the Defendant was permitted for a time to work the *Gwynfynydd* mine on his accounting to the Crown for the produce; but he was required not to remove any gold or auriferous quartz from the mine without the Crown local mining agent for the county being present as the agent of the Crown to see and check the weighing thereof before removal. It was alleged that this condition was necessary for the protection of the Crown's rights, and that the Defendant had disregarded the condition. In March, 1888, he removed a considerable quantity of gold in bullion from the mine to *London*, without giving to the agent for the Crown notice of the intended removal, and without the same having been weighed in the presence of any such agent, and he had since removed further quantities of gold and auriferous quartz in the same way. The Defendant refused to give an undertaking not to repeat

C. A. 1891 ATTORNEY-GENERAL v. MORGAN.

these acts, and it was alleged that he threatened and intended to continue working the mines and to remove gold and auriferous quartz therefrom, and to convert the same to his own use, it being the property of the Crown and taken without any lawful authority.

The Defendant, by his statement of defence delivered in March, 1889, did not admit the allegations of the statement of claim, and expressly denied many of them. He said that the mines in which the gold was found contained also lead, copper, and iron. The Defendant denied that Welsh gold was always found mixed with a certain quantity of silver. He said that it was always found mixed with copper, lead, or iron, or zinc blende, or some other base metal. The Defendant's main grounds of defence to the action were in substance contained in the following paragraph of his defence:—

"The Defendant does not admit that the said mines or any of them are Royal mines, or are, with all gold and silver found therein, the property of Her Majesty in right of her Crown, or that the *Gwynfynydd* gold mine has been worked before in 1864 and 1870, or that royalty on the gold then obtained was paid to Her Majesty. The Defendant is a subject of the Crown, and is, or was, when working the mines, the owner or proprietor of the mines aforesaid, and within the said mines gold and silver, or either of them, has been discovered, and there is also copper, iron, and lead, and the Defendant is entitled to hold and enjoy and work the same, whether such mines are Royal mines or not, in accordance with the provisions of the statutes in that behalf made and provided. The Defendant has always been, and is now, ready and willing, and hereby offers, to permit the Crown to have all gold and silver ore raised and laid upon the bank, and not yet removed, on payment of the sums in that behalf provided by the said statutes. The Defendant before action brought offered to let the Crown have the said ore on the terms aforesaid. As to any ore raised and laid upon the bank and heretofore removed, the Defendant says that the Crown did not pay or offer to pay for the same within thirty days after the same had been raised and laid upon the bank. Even if the said mines were Royal mines, shortly after the commencement of this action Her Majesty

granted all such mines and the right to work and get the same to Mr. *Chidlaw Roberts*, through whom the Defendant claims. The Defendant does not admit that no license or authority to work any part of the said mines has, up to the present time, been granted by the Crown to any person through whom the Defendant claims."

The statutes on which the Defendant relied were 1 Wm. & M. c. 30, and 5 Wm. & M. c. 6. The only question of importance for the purposes of this report was as to the construction of some of the sections of those statutes (1).

(1) 1 Wm. & M. c. 30: "Whereas by a statute made, &c. (5 Hen. 4, c. 4), it was, amongst other things, enacted in these words, or to this effect, namely, that none from thenceforth should use to multiply gold or silver, or use the craft of multiplication; and if any the same do, they should incur the pain of felony: And whereas since the making of the said statute, divers persons have by their study, industry, and learning, arrived to great skill and perfection in the art of melting and refining of metals, and otherwise improving them and their ores (which very much abound within this realm), and extracting gold and silver out of the same; but dare not exercise their said skill within this realm, for fear of falling under the penalty of the said statute, but exercise the said art in foreign parts, to the great loss and detriment of this realm;"

Sect. 2 repeals the 5 Hen. 4, c. 4.

Sect. 3 provides that all the gold and silver which shall be extracted by the said art of melting and refining of metals shall be used only for the increase of moneys, and shall be brought in to the *Mint*.

Sect. 4: "Provided also, and be it further enacted, that no mine of copper, tin, iron, or lead, shall hereafter be adjudged, reputed or taken to be a Royal mine, although gold or silver may be extracted out of the same."

5 Wm. & M. c. 6, recites sect. 4 of 1 Wm. & M. c. 30, and proceeds, "But notwithstanding the good provision by the said statute to prevent the discouraging their Majesties' good subjects who have mines of copper, tin, iron, or lead in their soils, from digging and opening the same, many doubts and questions have arisen upon the said statute, whereby great suits and troubles have arisen to many owners and proprietors of such mines; wherefore, for the better explanation of the said statute;"

Sect. 2: "Be it enacted, &c., that all and any person or persons, being subjects of the Crown of *England*, bodies politic or corporate, that now are or hereinafter shall be the owner or owners, proprietor or proprietors, of any mine or mines within the kingdom of *England*, dominion of *Wales*, or town of *Berwick-upon-Tweed*, wherein any ore now is, or hereafter shall be discovered, opened, found, or wrought, and in which there is copper, tin, iron, or lead, shall and may hold and enjoy the same mine or mines and ore, and continue in the possession thereof, and dig and work the said mine or mines or ore, notwithstanding that such mine or mines or ore shall be pretended

C. A. 1891 ATTORNEY-GENERAL v. MORGAN.

An interim injunction (not extending to raising ore) was granted by Mr. Justice *North* on the 27th of April, 1888, and on the 4th of May, 1888, the injunction was continued until the trial of the action or further order; but it was provided that the order was not to prevent the Defendant from bringing the rock to the surface and doing all that was necessary to extract the ore therefrom, he being thus only prevented from removing the ore from the lands in question.

The action came on for hearing before Mr. Justice *North* on the 3rd of July, 1890.

Sir *R. E. Webster*, A.G., *Napier Higgins*, Q.C., and *Vaughan Hawkins*, for the Crown:—

If a mine is worked exclusively or primarily for gold, as we say the *Gwynfynydd* mine is, it is a "gold mine," and therefore a Royal mine, and the provisions of the Acts of *William* and *Mary* in favour of the subject do not apply; so that the mine cannot be worked without the license of the Crown, and subject to such conditions as the Crown may impose. Those Acts apply only to mines which are worked for the purpose of obtaining the baser metals mentioned in the Acts, though gold or silver may be

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or claimed to be a Royal mine or Royal mines; any law, usage, or custom to the contrary notwithstanding."

Sect. 3: "Provided always, that their Majesties, their heirs and successors, and all claiming any Royal mines under them, shall and may have the ore of any such mine or mines in any part of the said kingdom of *England*, dominion of *Wales*, or town of *Berwick-upon-Tweed* (other than tin ore in the counties of *Devon* and *Cornwall*), paying to the proprietors or owners of the said mine or mines wherein such ore is or shall be found within thirty days after the said ore is or shall be raised and laid upon the banks of the said mine or mines, and before the same be removed from thence, the rates following (that is to say), for all ore washt, made clean, and merchantable, wherein is copper, the rate of £16 per ton; and for all ore washt, made clean, and merchantable, wherein there is tin, the rate of 40*s.* per ton; and for all ore washt, made clean, and merchantable, wherein there is iron, the rate of 40*s.* per ton; and for all ore washt, made clean and merchantable, wherein there is lead, the rate of £9 per ton. And in default of payment of such respective sums as aforesaid, it shall and may be lawful for the owners and proprietors of the said mine or mines, wherein such ore is, are, or shall be found, to sell and dispose of the said ore to his and their own uses; any law, statute, or custom to the contrary notwithstanding."

mixed with them. In the *Case of Mines* (1), in 1568, in the reign of Queen *Elizabeth*, it was laid down, by a majority of nine judges out of twelve, that, whenever there existed any gold or silver, however small the quantity, the mine was a Royal mine, the minority of three judges being of opinion that the Crown was not entitled to the mine if the precious metal was found in ore in which the value of the base metal was greater than that of the gold or silver in it. Subject to the statutory modification in favour of the subject, that has been the recognized law ever since: *Bainbridge* on Mines (2); *Stephen's* Commentaries (3); *Kent's* Commentaries (4).

By the Act 1 Wm. & M. c. 30, passed in 1688, the law was altered in favour of the subject to this extent, that it was declared that no mine of tin, copper, iron, or lead should thereafter be taken to be a Royal mine, although gold or silver might be extracted out of the same. That provision was afterwards considered insufficient, and the Act 5 Wm. & M. c. 6, was passed in 1694 "to prevent disputes and controversies concerning Royal mines." It contained a recital that doubts had arisen upon the former statute, and it enacted that owners or proprietors of any mines in England or Wales "wherein any ore now is, or hereafter shall be discovered, opened, found, or wrought, and in which there is copper, tin, iron, or lead, shall and may hold and enjoy the same mine or mines and ore, and continue in the possession thereof, and dig and work the said mine or mines or ore, notwithstanding that such mine or mines or ore shall be pretended or claimed to be a Royal mine or Royal mines." And by sect. 3 there was given to the Crown a right of pre-emption of the ore brought to bank "washt, made clean, and merchantable," upon payment of specified rates for ore in which there was copper, tin, iron, or lead. The rate payable in respect of ore in which there is lead was increased by the statute 55 Geo. 3, c. 134. Various definitions may be suggested as to what constitutes a copper, tin, iron, or lead mine to which the Acts apply. It is sufficient for the Crown's present purpose to say that, at all events, the Acts cannot apply to a mine or to

(1) Plowd. 310.
(2) 4th Ed. p. 128.
(3) 11th Ed. vol. ii., p. 558.
(4) 12th Ed. vol. iii., p. 378, n.

C. A. 1891

ATTORNEY-GENERAL v. MORGAN.

ore which is worked for gold and for gold only, or where gold is the only commercial product.

The Defendant in person:—

The meaning of the word "ore" at the time when the Acts were passed is shewn by Sir *John Pettus' Fodinæ Regales* (published in 1670). He says (p. 3): "We have not yet discovered any mines which yield any perfect gold or silver ore (as in *America* and other hotter climates, although we are not altogether out of hopes of very rich ores in *England* and *Wales*), but our former and later ages here have and yet do get gold and silver merely by extraction, or melting those baser hard metals, so as by art of the refiner the gold or silver is separated from them. Now the ores which this kingdom affords are only tin, copper ore, lead ore, iron ore, and cadmine ore (which some call callamine), of which brass is made with a mixture of copper. And those ores being digged, the miners bring them (being first beaten small and washed) to certain furnaces and mills prepared for that purpose. Where, when they are smelted and cast into a solid form, if lead, they call them pigs; if tin, blocks; if iron, bars; if silver or gold, cakes; if copper, rose-cakes. And being thus formed, the tin ore is called tin; the copper ore, copper; the lead ore, lead; the iron ore, iron; the cadmine and copper ore united is called brass; and this being once more melted (which melting is called refining), if they yield gold or silver in any advantageous quantity, the mine and ore are entituled accordingly."

The same work contains a number of grants made by successive English sovereigns, which shew that down to the passing of the Acts of *William* and *Mary* the Crown had been gradually parting with its prerogative rights in relation to mines. The evidence proves that the *Gwynfynydd* mine is a very poor one, the ore is of very low grade. But for exceptional advantages as to water-power, the mine could not be worked at all. A distinction is taken by Sir *John Pettus* (p. 9) between a "poor mine" and a "rich mine." The object of the Legislature in passing the Act of 5 Wm. & M. was to prevent the subject from becoming too rich, and therefore the right of buying all the ore men-

tioned at a fixed price was given to the Crown: *Bainbridge* on Mines (1).

The Crown stood by and allowed me to spend money in developing the mine, and did not interfere with me until I had discovered gold.

The claim of the Crown is premature, being made before it is ascertained whether the mine will pay to work.

The "ores" which are found in it are those to which the Acts of *William* and *Mary* refer. "Ore" means "metal unrefined": *Johnson's* Dictionary (ed. 1755); Sir *John Pettus*, in his *Laws of Art and Nature* (published 1683), p. 109, says, "Gold ores which are had in the mines out of which the veins in which the digged gold is clearly to be seen, namely, those ores in which the gold standeth in great grains and may be parted with the hand."

The Act 1 Wm. & M. c. 30, s. 3, shews that the object of the Legislature was to increase the coinage of the realm. And they intended to draw a distinction between gold which could be got without the exercise of any skill, or the expenditure of any money, and gold which required the exercise of skill and the outlay of money to extract it. The former was still to belong to the Crown; the latter was placed on a different footing. Sect. 4 applied to it. That section is quite distinct from sect. 2, and its effect is to supersede the decision in the *Case of Mines* (2).

But I rely mainly on the Act 5 Wm. & M. c. 6. The "disputes" referred to in the title of that Act could only have arisen upon sect. 4 of the former Act. The later Act applies not merely to "owners" but to "proprietors" of any mine or mines wherein any ore is or shall be found "in which there is copper, tin, iron, or lead." Sect. 3 contains an entirely distinct provision from that of sect. 2, and it applies exactly to such a case as the present. Possibly the effect is that the Crown is not entitled to any ore which contains all the four specified metals unless it pays for it the highest specified price, viz., that for lead. Sect. 3 fixes the price to be paid for the ore of "Royal mines."

As to costs, it is not usual for the Crown to claim costs against a subject.

[NORTH, J.:—The Crown was willing to have the question of

(1) 4th Ed. pp. 129, 139, 141–5. (2) Plowd. 310.

C. A. 1891

ATTORNEY-GENERAL v. MORGAN.

costs decided on motion when you had parted with your interest in the *Gwynfynydd* mine, but you would not assent.]

Napier Higgins, in reply :—

The Act 1 Wm. & M. c. 30, was passed, because it was thought to be hard and unjust that the Crown should, according to the decision in the *Case of Mines* (1), be entitled to, not merely the gold and silver found in a mine, but the copper, tin, &c., from which the gold and silver were extracted. The Act does not touch the ancient prerogative of the Crown so far as it applies to the present case. If the gold or silver was worth extracting it was still to belong to the Crown; but the mine itself, if in fact it was a copper mine or a tin mine, could not be claimed by the Crown merely because some gold or silver could be extracted therefrom.

So also the Act 5 Wm. & M. c. 6, was intended to deal with mines of copper, tin, &c., in which gold or silver may be found. That is the governing idea. The owners of such mines are to hold and enjoy them, notwithstanding that they shall be claimed to be Royal mines. Sect. 3 removes any ambiguity. The Act was intended to put an end to the doubts which had arisen upon the prior Act. If the mine is one of the four mentioned—copper, tin, iron or lead—no right of the Crown is to prevent the owner from working it; but the Crown is to be entitled to the ore on paying a fixed price for it. The Crown will thus have the benefit of the gold contained in the ore. But the Crown is still entitled to all Royal mines—all mines which are worked for the purpose of obtaining gold or silver, or where the gold or silver exceeds in value any base metal got by working. The evidence shews clearly that the *Gwynfynydd* mine was worked only for the purpose of obtaining gold; that large quantities of gold were in fact obtained, and that no other merchantable product was or could be obtained.

1890. Aug. 6. NORTH, J.:—

The only question to be decided in this action is, by whom the costs of it have to be borne, as the Defendant has since it com-

(1) Plowd. 310.

menced sold all his interest in the principal mine to a company which has from the first held a license from the Crown, and has duly paid and is paying royalty thereunder. But for this purpose it is necessary to consider the points in dispute between the Attorney-General and the Defendant with regard to mines of gold and silver (or Royal mines, as they are called).

The existence of gold in this country has long been known, and for many centuries the search for it has been prosecuted from time to time in various parts of *England*, *Scotland*, *Wales*, and *Ireland*, with more or less success. Among gold-bearing districts the neighbourhood of *Dolgelly*, in *Merionethshire*, has long had a high reputation. The presence of auriferous lodes or veins there has been distinctly ascertained, and gold has been sought there by various adventurers from time to time; though, if one may judge from the intermittent character of the workings, without any great commercial success. Various sums of money are proved to have been paid from time to time to the Receiver of the Crown in respect of gold so worked. Among such workings are those known as the *Gwynfynydd* mine, on a farm of that name in the *Mawddach Valley*, in the county of *Merioneth*. The Defendant, in a letter of the 22nd of April, 1888, states that this mine has been worked for gold by the *Mawddach Gold Mining Company* and others for a great number of years. In the years 1864, 1865, and 1870 various small sums were paid to the Crown Receiver as royalty for gold obtained there. The Defendant had known the county in question for many years, and, not daunted by the failures of his predecessors, he entertained a confident hope (which the result seems to justify) that gold could be got there in remunerative quantities, and on the 20th of October, 1887, he took a lease from Mr. *Chidlaw Roberts*, the owner of that farm, of the mines, beds, veins, and seams of copper ore, lead ore, gold and gold ore, and other metals, ores, and metallic minerals on the farm in question, for thirty years, subject to the rights of the Crown, and the rents, royalties, and covenants therein mentioned. And he commenced forthwith to work and develop the mines, and spent considerable sums in so doing, and providing the necessary plant and machinery.

This having been brought to the notice of the Commissioners

C. A. 1891 ATTORNEY-GENERAL v. MORGAN. North, J.

of Woods, Forests, and Land Revenues, in whom all the hereditary revenues of the Crown are vested, a correspondence ensued to which I will refer. [His Lordship referred to communications between the Commissioners and the Defendant, and to the nature of the action and the defences raised, and continued :—]

Before considering the points of law thus raised it is necessary to state certain other facts proved in evidence. First, with respect to the substance got in, and brought up from, the *Gwynfynydd* mine. According to the evidence of all the witnesses, this substance is quartz rock, which is found in lodes or veins. The *Chidlaw* lode—the principal vein worked—can be traced for miles through the country, and averages about fifteen feet or more in breadth in the *Gwynfynydd* mine. In this the gold is found, and the Defendant states that the *Chidlaw* vein is always more or less auriferous. In some places the quartz is extremely rich, and very beautiful specimens have been produced in Court, shewing native gold in large quantities; shewing here and there traces of crystallization, but chiefly being laminated or dendritic. The Defendant states that at one place he, in about a fortnight, took out his own weight in gold, 2654 oz., and that, if this had continued, the mine would have been worth millions a year. In other places the gold is disseminated through the quartz in visible specks or grains; but, in the greater portion of the quartz rock, the gold is too small in quantity to be detected by the naked eye. What is worked in and brought up from the mine is this auriferous quartz, and nothing else. Other minerals are found in this quartz besides gold; the gold itself contains silver alloyed with it. The quartz also contains small quantities of galena, or sulphuret of lead; of copper and iron pyrites, being sulphides of copper and iron; of blende, or sulphide of zinc; and of oxides of manganese and iron; and various other minerals, some being metallic and some not. These various substances, thus associated in the quartz rock, all may be, and probably some of them are, auriferous, themselves including gold. [His Lordship then reviewed the evidence as to the mode and results of the working, and continued :—]

In the result, it is quite clear that there has not been, and is not, any mining or working for lead, copper, or iron: and that

none of those metals has been obtained, except in such very small quantities as to be entirely without value. And this agrees entirely with the returns made (for totally different purposes) under the *Metalliferous Mines Regulation Acts*, which, for the years 1887, 1888, and 1889, shew the quantity of "gold ore" got, but do not make any return of copper, iron, or lead ores at all.

Upon these facts I have no difficulty in coming to the conclusion that the mine on the *Gwynfynydd* farm is a gold mine and nothing else. The Defendant himself paid a royalty to the Crown for working it; he sold it as a gold mine to the company he promoted to purchase it; the company so formed to buy and work it was called the *Morgan Gold Mining Company*; it has worked for gold alone, and has paid royalty thereon, and has sold gold only; and has, in fact, found nothing else, except in such small quantities as above mentioned. The suggestion that the mine is worked for other minerals as well as gold is a fiction.

The law with respect to the right of the Crown in mines does not present any serious difficulty. It seems probable that at one time the right to all mines, even in the land of a subject, was vested in the Crown, but that in the course of years the right to get all baser mines in his lands was conceded to the subject who owned such lands, except in certain portions of the kingdom with which we are not now concerned. In this concession, however, no Royal mines, or mines of gold and silver, were included, and such mines have from the first always been, and still are, the exclusive property of the Crown as part of the Royal prerogative. The Defendant remarked with severity upon the hardship of the Crown's claiming the gold which is found in the land of a subject, and belongs to him; but, as the gold does not belong to him and he has no right to touch it without authority from the Crown (except so far as he acquires such right under the statutes to be mentioned presently), these comments have no foundation. The well-established right of the Crown to all gold and silver extended not only to those metals themselves when found in a comparatively pure state, but also to all other ores and substances containing gold or silver; and in the great *Case of Mines* (1), before

(1) Plowd. 310.

C. A. 1891 ATTORNEY-GENERAL v. MORGAN. North, J.

the twelve judges in the reign of Queen *Elizabeth* (1568), it was decided authoritatively by all the judges and barons (1) "that by the law all mines of gold and silver within the realm, whether they be in the lands of the Queen, or of subjects, belong to the Queen by prerogative, with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore," and it was agreed unanimously by nine out of the twelve judges, "that if the gold or silver in the base metal in the land of a subject be of less value than the base metal is, as well the base metal as the gold or silver in it belong by prerogative to the Crown, with liberty to dig for it, and to put it upon the land of the subject, and to carry it away from thence; and in such case it shall be called a 'Mine Royal,' for the records don't make any distinction herein, but they are general, and prove that all ores or mines of copper or other base metal, containing or bearing gold or silver belong to the King." And it was held accordingly that a large quantity of copper ore from a copper mine belonged to the Crown, because it contained some gold and silver; and that the mine was a Royal mine. Three of the judges seem to have taken the view that this might have been otherwise, and that the mine would not have been Royal, if it had been proved that the value of the copper had exceeded the value of the gold and silver contained in it; but this was opposed to the view of the other nine judges, and has never been adopted; and, having regard to the facts which I have stated, has no bearing upon the present case. Subsequently to that decision divers questions arose as to the proportion which the gold or silver should bear to the baser metal containing it in order to make the mine a Royal mine; and in the years 1640–1641 an opinion was signed by fifteen eminent counsel to the effect that, if the value of the gold or silver, when extracted from the baser metal, was more than the charge of refining it, or was worth more than the base metal spent in refining it, the mine was Royal, and the baser metal, as well as the gold and silver therein, belonged to the Crown; otherwise not; and this view seems to have been extensively acted on. As, however, trade and commerce increased, and the products of

(1) Plowd. 336.

mines were in greater demand, the metallic ores were more extensively sought for than before. At the same time the greater skill and research expended in the treatment of such ores, when got, disclosed the fact, that gold and silver could be extracted with profit from ores in which they were previously not known to exist, and, as this might, and often did, give rise to a claim to the whole mine as a Royal mine, the search for valuable mines of the baser metals, and the working of them, when ascertained to exist, was seriously impeded and discouraged. The desire to mitigate this evil led to the passing of two Acts in the reign of *William* and *Mary*, upon which the only part of the Defendant's case which has any substance is founded. The first of these Acts, 1 Wm. & M. c. 30, passed in the year 1688, recited an Act of *Henry* IV., by which what was called the craft of multiplying silver and gold was made a felony, and it then, in sect. 1, recited as follows. [His Lordship read the preamble, and continued:—] The 2nd section then repealed the Act of *Henry* IV., and sect. 3 provided: "That all the gold and silver that shall be extracted by the aforesaid art of melting and refining of metals, and otherwise improving of them and their ores as before set forth, be from henceforth employed for no other use or uses whatsoever, but for the increase of moneys; and that the place hereby appointed for the disposal thereof, shall be their Majesties *Mint* within the *Tower of London*; at which place they are to receive the full and true value for their gold and silver so extracted from time to time, according to the assay and fineness thereof; and so for any greater or lesser weight: and that none of that metal of gold and silver, so refined and extracted, be permitted to be used or disposed of in any other place or places within their Majesties kingdoms and dominions."

This section was repealed in the year 1867; but it may still, in my opinion, be looked at, so far as it throws any light on the construction of the Act of which it was an important part. The Defendant contends that the provision that the person giving up the gold and silver to the *Mint* is to receive the full and true value thereof is inconsistent with the right of the Crown to any part of it as a royalty; but it is nothing of the kind. The fact that the man who has to take gold and silver to the *Mint* and

C. A. 1891 ATTORNEY-GENERAL v. MORGAN. North, J.

leave it there is to receive the full and true value of what he so leaves has nothing to do with his title to it, or the terms upon or obligations under which he acquired it. If, but for this section, such person would have had to pay a royalty, the section no more relieves him from paying it than it would confer a good title to the gold upon a thief who had stolen it.

The 4th section of that Act, which is still unrepealed, runs as follows: "Provided also, and be it further enacted by the authority aforesaid, that no mine of copper, tin, iron, or lead shall hereafter be adjudged, reputed, or taken to be a Royal mine, although gold or silver may be extracted out of the same." It is difficult to ascertain from the language used what was the exact aim or object of the framers of that section. It required explanation, which it received five years later. But it clearly does not, as it stands, assist the Defendant in the present case; for no one contends that the *Gwynfynydd* mine can be described fairly as a mine of copper, tin, iron, or lead.

In the year 1693 another Act, 5 Wm. & M. c. 6, was passed. It is entitled "An Act to prevent disputes and controversies concerning Royal Mines." It recites the 4th section of the previous Act, which I have just read, and then proceeds as follows. [His Lordship read sections 2 and 3 of the Act, and continued:—]

By a subsequent Act, 55 Geo. 3, c. 134, the rate for lead was altered to £25 a ton; the other rates still remain as originally fixed. The Defendant suggests that the rates here named were the market prices of the time for ores of lead, copper, iron and tin. This can hardly be quite correct, as not only would market prices vary from day to day, but different ores of the same metal would vary in value; but probably they were prices fixed at such sums as it was considered would secure to the subject under all probable circumstances the full value of the copper, tin, iron, or lead in the ore which the Crown elected to take from him under the statute.

The principal argument of the Defendant was based upon the 2nd section of the Act 5 Wm. & M. c. 6. He says that it differs altogether in language from the 4th section of the prior Act, which dealt with mines of copper, tin, iron, and lead; whereas the later Act speaks of the proprietor of any mine wherein any

ore is found in which there is copper, tin, iron or lead, and authorizes him to work such mine or ore. And then the Defendant says, he and his company are proprietors of a mine—namely, the *Gwynfynydd* mine—in which ore (namely, auriferous quartz, or gold ore) is found, in which there is copper, iron, and lead; and he claims the right to work it under the statute. In my opinion, after a careful consideration of the letter and spirit of that statute, this is not its true construction. The earlier Act merely deals with mines of copper, tin, iron, or lead, and does not refer to any gold or silver mine, or to any mine or ore of any base metal other than copper, tin, iron, and lead; it does not, for instance, refer to any mine or ore of zinc, though blende is very often found to be highly auriferous and actually is found at the *Gwynfynydd* mine itself in that condition: in fact, a report to which I have been referred speaks of the peculiarly kindly influence which the presence of blende has on the gold-bearing character of the stone, and says that some of the blende is extraordinarily rich in gold, which in some cases was as much as one-third of the total weight. So, far, therefore, as zinc is concerned, the law was not altered by the earlier statute. The preamble of the second Act states that the object of the first Act was to prevent discouraging subjects who had mines of copper, tin, iron, or lead in their soils from digging and opening the same, and that many doubts and questions had arisen upon the statute whereby suits and troubles had arisen to many owners and proprietors of such mines; and it states in the title that the Act was intended to prevent such disputes and controversies. We have it, therefore, that the owners and proprietors of such mines were the persons prejudiced by the existing state of things, for which the Act proposed to find a remedy. The next thing to be noticed is that the Act is expressly stated to be for the better explanation of the former statute—that is, of the recited section of it—namely, the fourth. It does not purport to be an addition to or extension of it so as to apply it to persons or things not affected by the former statute, but is merely an explanation of it; though no doubt it supplies new details as to the mode in which its object was to be accomplished. The 2nd section then provides that the persons thereby authorized to work a mine or mines or ore may do so, "notwithstanding

C. A. 1891 ATTORNEY-GENERAL v. MORGAN. North, J.

that such mine or mines or ore shall be pretended or claimed to be a Royal mine or Royal mines." The allegation that the mine or ore is Royal is not to prevent the working, whether such allegation be well founded or not. If on subsequent working it turns out that the mine or ore does not contain gold or silver, then the Crown's claim has no foundation, and the subject's right to work it is clear; in that case no protection is required and the Act does not confer any. The Act only applies to cases in which gold or silver does exist in the mine or ore worked, and in such cases protection is conferred upon persons working under that section. The title to the Act bears out this view, as it refers to disputes and controversies concerning *Royal* mines, not concerning mines found not to be Royal. The words of the Act are: "The owner or proprietor of any mine wherein any ore shall be discovered, opened, found, or wrought, and in which there is copper, iron, tin, or lead." No ore not containing one of those four named metals is within this Act at all, whether such ore be gold, or silver, or zinc, or other base metal. Suppose, however, that with the gold ore or zinc ore some copper, iron, or lead is found, but merely in such trivial quantities as not to be worth working, are these Acts intended to apply to such a case? For the existence of those metals under such circumstances would not make the mine a copper, iron, or lead mine, or bring its proprietor among the class of persons intended to be benefited by the Acts—the mine would be called a gold or zinc mine and nothing else. The case I have put as to zinc is not an imaginary one, for a reference to *Dana* and other standard works on mineralogy shews that blende almost always contains iron, and is generally associated with lead or copper or both. And, if such a case is within the Acts, how is the protection given to the Crown to be worked out? In the hypothetical case I am putting the ore is zinc ore containing gold and also small quantities of copper, iron, and lead, or two or one of them. Assuming the gold to be worth extracting, the Crown may elect to take the ore under the 3rd section, paying £16 per ton for it, if it contains copper, or £2 a ton if iron, or £25 a ton if lead. Is the Crown to take and pay for the blende in question, without regard to what its own value may be—at £2 a ton, if it contains a small quantity of iron, but to pay £16

a ton for the blende, if it has a small admixture of copper, or £25 a ton for the blende, if it contains a little lead? A still more remarkable result would constantly occur, if this were the true construction of the statutes. Suppose the ore to be iron ore, for which the statutory price is £2 a ton. Is the Crown intended to buy this iron ore at the rate of £16 a ton, if it has a little copper with it? or to pay £25 a ton for it, if it contains a little lead? Suppose the ore to be iron ore, with a little lead, and six ounces of gold or bullion to the ton, worth, say, £3 16*s.* an ounce—a very remunerative amount, for the prospectus I have mentioned speaks of three ounces to the ton as a rich result. The value of the iron ore would be £2, and of the gold something under £23. The Crown would refuse to take the whole at £25 a ton, and the result would be that the proprietor of the iron mine, the ore of which is appraised by the statute at £2 a ton, would keep for himself nearly £23 worth of gold per ton of iron ore, merely because his iron contained a little lead in such small quantity as to be wholly without value. Such a result is what would follow, if the construction of the statute contended for by the Defendant is the true one; but such a result is absurd, and a statute is not to be so construed as to lead to an absurdity, if any other reasonable construction can be placed upon it.

To revert to the actual words used. What is meant by "an ore in which there is copper, iron, tin, or lead"? The Defendant says it means gold ore or zinc ore, *e.g.*, associated with some other ore of copper, iron, tin, or lead; but those are not the words of the 2nd section, which does not refer to copper, iron, lead, and tin as ores, but as metals. When ore is intended, that word is used; when it is not intended, that word is omitted. What is the meaning of the word "ore"? Its primary meaning, according to *Johnson's* and *Richardson's* dictionaries, is unrefined or unreduced metal, *i.e.*, metal in combination with something else. According to *Webster's* and the Imperial dictionaries, ore is the compound of a metal with some other substance, as oxygen, sulphur, carbon, &c., by which its properties are disguised or lost, and they distinguish such ores from metals uncombined with other substances, which are called native metals. It is in this sense that the word "ore" is used in the 2nd section of the

C. A. 1891 ATTORNEY-GENERAL v. MORGAN. North, J.

Act, as a combined substance of which metal forms a part, and it is not ore of any kind, but ore into the combination of which one or more of the metals, copper, tin, iron and lead, enters; in other words, the ore must be one which can properly be called copper ore, iron ore, tin ore, or lead ore, which would not be the case if the contents of the mine or lode were substantially something else, even though such ores as I have mentioned were found therein in inconsiderable quantities. The direction that the proprietor of a mine in which such ore is found may hold and enjoy, and continue in possession of, and dig and work the same mines or ore, has no meaning whatever in connection with ore found merely in such small quantity as to be without value, which no proprietor in his senses would attempt to dig or work; nor has the subsequent provision, giving the Crown the option of taking the ore, when washed, cleaned, and made merchantable. To sum up, both Acts of *William* and *Mary* are for the benefit of the owners or proprietors of copper, iron, tin, and lead mines, and no others, and the object and aim of those Acts is to secure to the subject the copper, iron, tin, and lead ores found in his soil, or the full value thereof as fixed by statute, and at the same time to secure to the Crown all the gold and silver, if it chooses to take it, paying the value of the copper, iron, tin, and lead ores which accompany it. The Defendant seeks to use those Acts, not for the purpose of getting his copper, iron, or lead ore, or its value, for he has none of any value, but for the purpose of appropriating for himself and his company, without payment, the gold and silver in their land which belongs to the Crown. The *Gwynfynydd* mine is not a copper, iron, tin, or lead mine, and no one has ever so described it; its owners, therefore, are not protected by the Acts.

Even if I had taken the view, that the Defendant was within the protection of those Acts, and that the *Gwynfynydd* mine was a lead, copper, or iron mine, I must still have held that he was quite in the wrong in the course which he has taken. The 3rd section of the second Act enacts that the owners of the Royal mines may have the ore of any such copper, iron, tin, or lead mine upon payment to the owners or proprietors of the mines wherein such ore is found, within thirty days after the ore is

raised and laid on the bank, the rates I have already mentioned for each ton of the ore washed, made clean and merchantable; and then it provides that, in default of payment of such respective sums, it shall be lawful for the owner and proprietor of the mine to sell and dispose of the ore for his own use. Has the Crown ever had the option thus given, and has it made default in exercising it? Most certainly not. It will be remembered that in his defence Mr. *Morgan* pleads that he had offered to let the Crown have the ore raised and laid on the bank at the statutory rate. But the only evidence which the Defendant gives in support of these allegations is this: He says, "I have offered to sell to the Crown all the ore I have raised at the statutory price. I have made that offer verbally to Mr. *Culley* many a time. I told him one day the manager had reported that there were 100,000 tons of stone ready to break in No. 1 adit alone, meaning to detach it from its place in the mine by blasting it down, and that there were also accumulations of stone already broken lying at the mouth of the adit; and I desired Mr. *Culley* to go on removing it, and said that as fast as he removed it I would break more, and when he had removed the 100,000 tons I would ask him for a cheque for £2,500,000 as provided by statute; but he declined to take it on those terms."

It is absurd to treat quartz rock in the rough, just as brought up from the mine, as ore "washed, made clean, and merchantable." It is not even merchantable as it stands. The Defendant does, it is true, say that this quartz rock is gold ore, and that as it lies at the mouth of the adit it is merchantable and marketable, which I understand to mean, that it is in condition to be sold, and would command a price in the market. But this is wholly nconsistent with his own evidence, in which he took pains to point out that, but for the existence upon the mine itself of mills to which the quartz rock is easily brought by gravitation and of enormous water power to work the mills, light the mines, and so on, the gold could not be got except at a very great loss. The rock cannot be merchantable; it cannot fetch anything in the market, if it is valueless to every one except the proprietors of the farm upon which it is found. Moreover, the ore has not

C. A. 1891 ATTORNEY-GENERAL v. MORGAN. North, J.

been washed or made clean at all; it is still in the gangue or matrix. The processes by which lead and copper ores are separated from the rock in which they are found, and washed, cleaned, and made merchantable are familiar to most persons, whereas the quartz rock here which the Defendant calls gold ore has not been subjected to any process at all. It will be observed that the concentrates have been subjected to some cleaning process; but it is not alleged that they have been offered to the Crown, nor indeed could that have been done after the gold had been extracted. The Defendant says that he never was under any obligation to wash or clean the ore. I am not so sure of that. My own view is that, if a man claims under these Acts to work and get ores which he could not touch but for the Acts, he is bound to do all that is necessary to enable the Crown to exercise the option secured to it by the same Acts of taking the ore at the statutory price, viz., so much per ton of ore washed, and made clean and merchantable. But, be that as it may, the Act is quite clear that the owner or proprietor cannot remove, sell, or dispose of the ore until after the Crown has made default in payment, and there can be no default in payment till the price has been ascertained, which cannot be done until the ore has been washed, and made clean and merchantable. Therefore, if the owner chooses (if he has the choice) not to wash the ore, or make it clean and merchantable, the result is, it must remain on the land, and cannot be removed from thence. The Defendant deliberately persisted in removing and selling the product of the mines without any license, and in spite of the repeated protests and remonstrances of the Crown, and maintained his right to do so. In this he was wholly wrong, and this in itself would entitle the Crown to the relief it asks. [His Lordship then dealt with the other lands, as to which he held that the Defendant's case also wholly failed, and continued:—]

There were two or three matters upon which the Defendant laid great stress, on which I ought perhaps to say a few words. He contended that, if the Crown's claim has any foundation, it is, at any rate, put forward prematurely, as the mine is a poor mine, and does not yet pay its expenses. If the fact were so, it would not constitute any legal defence; for the Defendant could

not justify his appropriation of the gold, which is not his, by merely shewing that the operation did not turn out a profitable one to him. But the argument is not founded on fact. All that the Defendant alleges is, that the returns have not yet sufficed to repay the full amount of the large recent expenditure on mills, machinery, &c. This may be true, but it is not inconsistent with the mine's being a paying and valuable one; in fact, after the expenditure of £45,000 had been made, the Defendant sold the mine for £190,000.

The Defendant also contended that the existence in the present case of any right in the Crown to Royal mines as part of the Royal prerogative was against the interests of the public; inasmuch as the Crown could not work the mines, and its adoption of the dog-in-the-manger policy of preventing others from working what it could not work itself had the effect of preventing the development of labour, and paralyzing a valuable industry among the poor inhabitants of this district, because the exaction of the Crown's and landowners' royalties rendered the workings unprofitable. This is not a legal argument at all, and I believe that the Defendant put it forward, not in the hope that it would prevail with me, but for other purposes of his own. If the Crown has the legal right it claims, I must give effect to it, whatever the result; and any remedy for the grievances alleged to arise therefrom must be sought elsewhere. But the contention is based upon an almost ludicrous suppression of the real facts of the case. What are the real facts? The *Morgan Gold Mining Company*, of which the Defendant is the principal member and moving spirit, is not a body existing for charitable or philanthropic purposes, or even for the object of providing work for the poor inhabitants of the Principality. It is a commercial body, formed to carry on the work of mining on commercial principles, with a view to the profit of its members and nothing else; unless this result could be obtained the mines would not be worked at all. If all profits and anticipation of profits were at an end, the company would at once be wound up. If the Crown royalty were discontinued, the receipts of the shareholders would be proportionately increased. What, again, is the position of the Crown? In speaking of the

C. A. 1891 ATTORNEY-GENERAL v. MORGAN. North, J.

right to Royal mines one speaks for convenience of the claim of "the Crown," to which all such rights originally belonged. But, when such remarks as above mentioned are made, more accuracy and precision of language are necessary. From the time of the Revolution the hereditary possessions of the Crown, including mines Royal, have been given up to the nation, in exchange for the appropriation to the use of each reigning monarch of what is known as the Civil List. These possessions are administered by the Commissioners of Woods, Forests, and Land Revenues on behalf of the public; and the income and royalties derived therefrom are not received by Her Majesty at all, but form part of the general revenue of the country, and are applied for national purposes—in relief, so far as they go, of general taxation. It is, however, wholly untrue to say that the Commissioners, who administer the Crown estates, prevent the owners of land from mining for gold therein, although they are undoubtedly entitled as a matter of law to do so, if for any reason such a course should be deemed desirable. So far is this, however, from being the case, that they are always willing to grant a license to work such mines, on payment of a moderate royalty, generally fixed at one-thirtieth of the gold produced. And in this very case they expressed their willingness to grant to the Defendant a license to work the mines in question, and to retain for himself twenty-nine-thirtieths of the gold, on what appear to be *primâ facie* the extremely liberal terms of accounting to the Commissioners for the remaining one-thirtieth only. This he has deliberately refused to do, and has claimed, and still claims, the entire produce. In other words, the whole contest has arisen from the persistent endeavour of the Defendant to prevent the application of part of the public revenue of the country to its legitimate purposes, and to divert it into the pockets of himself and his fellow-shareholders; and he says it is against public policy that this attempt should be resisted. The Attorney-General has in this action been wholly right from the beginning, and would be entitled now, if he desired it, to an injunction as asked against the Defendant. He has not thought it worth while to do so, as the Defendant has since the action was commenced sold the *Gwynfynydd Mine* to a company, who

have received a Crown license to work, and are duly paying the royalty thereunder; but the Defendant has persevered in his unfounded assertion of right, and has required that the action should be brought to trial in order to decide who should pay the costs of it; and, as I hold that he has been wrong throughout, I must adjudge that he do pay the Plaintiffs' costs of the action. It was said that the Crown ought not to have costs against a subject; but I do not see why not; nor why the revenues of the country should bear the expense of the successful resistance to an attempt by the Defendant to misappropriate them.

W. L. C.

C. A. 1891 ATTORNEY-GENERAL v. MORGAN. North, J.

From this judgment the Defendant appealed. The appeal came on for hearing on the 14th of January, 1891.

C. A.

The Defendant, in person, supported the appeal. He relied on the same arguments as in the Court below; and further stated, that he had ascertained the market-prices of copper, lead, and iron in 1693, the date of the statute 5 Wm. & M. c. 6, and could prove by evidence, if he had the opportunity, that they were so out of proportion to the prices to be paid for the ore by the Crown under that statute, that it was clear that it would not be worth while for the Crown to assert its right of pre-emption, unless the mine were unusually rich in gold or silver.

Sir *R. E. Webster*, A.G., *Napier Higgins*, Q.C., and *Vaughan Hawkins*, for the Crown, were not called on.

1891. Jan. 21. LINDLEY, L.J.:—

At Common Law all gold and silver occurring in any mine in *England* or *Wales* belonged to the Crown; and if metalliferous ores contained gold or silver to such an extent as to be worth extracting, and if such ores could not be obtained without interfering with such gold or silver, the whole of such ores belonged to the Crown; and the Crown had the right to work not only gold and silver mines, but also all other mines containing gold and silver worth extracting. This was settled in the great *Case of Mines* (1). Mines containing gold or silver to such an extent

(1) 1 Plowd. 310.

C. A. 1891 ATTORNEY-GENERAL v. MORGAN. Lindley, L.J.

as to be worth working for their extraction were called Royal mines. The best definition which I know of Royal mines is given by Sir *John Pettus* in his work *Fodinæ Regales* (published in 1670). He says (1): "Although the gold or silver contained in the base metal of a mine in the lands of a subject be of less value than the base metal; yet, if the gold or silver do countervail the charge of refining it, or be of more worth than the base metal spent in refining it, this is a mine Royal; and as well the base metal, as the gold and silver in it, belong to the prerogative of the Crown." The rights of the Crown in Royal mines seriously obstructed the working of many of the most important mines in the kingdom. To remedy the inconvenience produced by this state of the law, two statutes were passed in the latter part of the seventeenth century, viz., 1 Wm. & M. c. 30, s. 4, and 5 Wm. & M. c. 6. The first of these Acts required all gold and silver, when extracted by refiners, to be taken to the *Mint*; but it also enacted, by sect. 4, that no mine of copper, tin, iron, or lead should be a Royal mine, although it might contain gold or silver. This enactment did not affect the right of the Crown to gold or silver in any mine. The Act prevented the Crown from claiming any copper, tin, iron, or lead mine on the ground that it contained gold or silver; and I apprehend that the Act also abrogated the right of the Crown to any copper, tin, iron, or lead ore got from any such mine on the ground that such ore contained gold or silver. But the gold or silver, if any, remained the property of the Crown; and it is easy to see that owners of copper, tin, iron, or lead mines containing gold or silver might still be very much embarrassed in working their mines, notwithstanding such mines were no longer Royal mines.

The second Act, 5 Wm. & M. c. 6, was passed to remedy this state of things. [His Lordship read the preamble and the 2nd and 3rd sections of the Act, and continued:—]

The preamble shews the object of the Legislature. The Legislature assumes that there is some copper, tin, iron, or lead mine worth working by the owner, and then authorizes him to work it, though it contains gold or silver; but the statute protects the Crown by giving it an option to take the ore, with the gold or

(1) Page 75.

silver in it, at certain prices. If the Crown does not desire to buy the ore at these prices, then the mine-owner can deal with the whole ore as he pleases, though there may be gold or silver in it. Such, in my opinion, is the short effect of this statute, and so it has been hitherto understood by lawyers. See *Comyn's* Digest *Waife* (*H.*) Mines; *Blackstone's* Commentaries (1). I can find nothing in the language of the statute which warrants the construction contended for by the Appellant, which is that, wherever gold or silver is associated with one of the named metals, the owner of the soil is entitled to the gold or silver, unless the Crown chooses to pay the statutory prices for the mixed ore, without reference to the question whether the mine is worth working for the sake of the base metals or not. The object of the statute is not to enable owners of mines to extort money from the Crown, but to protect them from extortion by the Crown. This is plainly shewn by the preamble. It is true that the statute does not use the expression copper ore, &c., but mentions ore in which there is copper, &c.; but the section relating to the payments to be made by the Crown, coupled with the preamble, convinces me that what the Crown was to buy or leave alone was copper ore, lead ore, iron ore, or tin ore, as the case might be, and not gold or silver ore containing copper, lead, iron, or tin which the mine-owner would not incur the trouble and expense of working.

Again, it may be true, as the Appellant alleged, that when the Act passed the price of the base metals was less than the statutory prices to be paid by the Crown for their ores. Assuming this to be so, the only effect would be to deter the Crown from interfering with the working of copper mines, &c., unless the gold or silver in them were present in such quantities as to make it worth the while of the Crown to pay the statutory prices for the mixed ore. This would still be to protect a person desirous of working the mines for the sake of the base metals contained in them. Even if, therefore, there were any evidence as to the prices to the effect suggested by the Appellant, and assuming that, if the Court gave him liberty now to adduce such evidence he could adduce it, I should still fail to see how it followed that

(1) Vol. i. p. 295.

C. A. 1891 — ATTORNEY-GENERAL v. MORGAN. — Lindley, L J.

the Crown could be forced by a mine-owner to yield its right to gold or silver unless it would pay the statutory price for ore associated with the gold or silver, but which ore no one would dream of working for the sake of obtaining the base metal which alone belongs to the mine-owner. The mines in question in this case are admitted to be such that no one would work them for the sake of the base metals in them. That being so, the decision appealed from is correct.

In the view I take of the true construction of the statute it is unnecessary to consider whether the Appellant so dealt with the ore as to entitle him to remove it, on the ground that the Crown had not duly exercised its option to take it. I regard the case, not as one in which the owner of a lead mine is seeking the protection of the statute, but as one in which the owner of a gold mine is seeking to strain the Act for the purpose of depriving the Crown of its well-known rights. The appeal must be dismissed with costs.

LOPES, L.J.:—

Mr. *Morgan*, who has argued his case with great ability, admits that his case against the Crown fails unless he can bring himself within the protection afforded to the subject by the statutes of *William* and *Mary*. His contention is, that because the mines in question contain some copper, lead, and iron he is protected by the statutes. It seems that before the passing of those Acts every mine from which gold or silver was extracted was regarded as a Royal mine. Any mine which was discovered in which there was any portion of gold or silver was liable to be claimed as a Crown mine. Valuable mines of baser metals were concealed, and there was universal distrust. Such a state of things called loudly for legislative interference, and the Act 1 Wm. & M. c. 30, was passed declaring that "no mine of tin, copper, iron, or lead" should thereafter be taken to be a Royal mine, although gold or silver might be extracted out of the same. This Act had reference to mines of tin, copper, iron, or lead, and no other; it was for the benefit of proprietors of those mines only, and left gold and silver mines in the same position as they were in before the passing of that statute. The provisions of the above statute

were, however, not considered sufficiently clear, and another statute was soon afterwards passed to explain the former. [His Lordship read the preamble and sects. 2 and 3 of the Act, and continued:—] The object of the Act and the former Act is to secure to the subject the copper, tin, iron, and lead ores found in his soil, or the value thereof as fixed by the statute, and at the same time to preserve for the Crown all the gold and silver, if it chooses to take it, paying the value of the baser metals associated with it. The Defendant has none of these baser metals of any value in the mine; he is not working the mine for the sake of them; he is working the mine in order to obtain gold, which he seeks to appropriate to himself, in contravention of the rights of the Crown.

The mine in question is not a copper, iron, tin, or lead mine; it has always been regarded and described as a gold mine. The Defendant paid royalty to the Crown for working it. He sold it as a gold mine to a company; the company was called the *Morgan Gold Mining Company*; the mine was worked for gold only; gold only was sold. No business man would think of working it for the sake of the baser metals. They could not be won in respect of quantity, quality, or having regard to locality, so as to make them merchantable. The Defendant, therefore, is not protected by these Acts. Those Acts have no reference to a gold mine such as this is.

It is said that the rates fixed by sect. 3 of the second Act are prohibitive. To a certain extent I think they are so intended, the object being that the Crown should not be induced to take the ore unless it contained sufficient gold or silver to make it worth while to pay those rates. This was for the benefit of the subject, and secured to him the produce of his mine in all cases where there was not a substantial quantity of precious metal.

KAY, L.J.:—

In the 5 Hen. 4, it was enacted that none should thenceforth use to multiply gold or silver, or use the craft of multiplication.

In the 9 & 10 Eliz. (1568) was tried the *Case of Mines* (1)

(1) 1 Plowd. 336.

C. A. 1891 ATTORNEY-GENERAL v. MORGAN. Kay, L.J.

before all the Judges. The majority of the Judges determined, "that if the gold or silver in the base metal in the land of a subject be of less value than the base metal is, as well the base metal as the gold or silver in it belong by prerogative to the Crown, with liberty to dig for it, and to put it upon the land of the subject, and to carry it away from thence; and in such case it shall be called a mine Royal, for the records don't make any distinction herein, but they are general, and prove that all ores or mines of copper, or other base metal, containing or bearing gold or silver belong to the King."

This state of the law naturally operated as a great discouragement to the enterprise of mining for the base metals in this country, and accordingly in 1688 an Act was passed, being the 1 Wm. & M. c. 30. This Act recited the Act 5 Hen. 4, c. 4, to the effect to which I have stated, and proceeded thus in the preamble. [His Lordship read the rest of the preamble, and continued:—] Sect. 2 then repeals the Act of Hen. 4. Sect. 3 provides that all the gold and silver that shall be extracted by the aforesaid art of melting and refining of metals, and otherwise improving of them and their ores, as before set forth, are to be employed for no other use but for the increase of moneys, and should be sold at the *Mint* for their full value, and not elsewhere. Sect. 4 provided "that no mine of copper, tin, iron, or lead shall hereafter be adjudged, reputed, or taken to be a Royal mine, although gold or silver may be extracted out of the same."

I will assume that the last words "the same" mean the mine, though it is possible, looking at the preamble, that they meant the copper, tin, iron, or lead, or the ores of those metals, respectively.

Difficulties still arose, and another Act was passed, the 5 Wm. & M. c. 6. [His Lordship read the preamble, and continued:—]

Sect. 3 provided that the Crown and all claiming any Royal mines under it might have the ore of any such mine or mines in *England* or *Wales* other than tin ore in the counties of *Devon* and *Cornwall*, paying to the owners of the mine within thirty days after the ore is raised for "all ore washt, made clean, and merchantable, wherein is copper, the rate of £16 per ton," and

other rates for tin, iron and lead, and in default of payment the owners might sell the ore for their own uses. The rates of payment fixed by this statute were altered by a later Act (55 Geo. 3, c. 134). All the sections of the 1 Wm. & M. c. 30, except sect. 4, were repealed by the *Statute Law Revision Act*, 1867. Sect. 4 of 1 Wm. & M. c. 30, clearly applied only to mines of copper, tin, iron, or lead. The question is, whether these later statutes refer only to mines of that kind, or whether they include all mines, for whatever purpose worked, which contain gold or silver, and which also contain some copper, tin, iron, or lead.

The Defendant has suggested that the price of copper at the time of this legislation was so low that ore containing 5 per cent. of pure copper would be merchantable, and that it would not be worth the while of the Crown to take the ore at the price mentioned in the statute unless it contained in addition five ounces of gold at least in the ton of ore. This, says the Defendant, is nearly five times as much gold per ton as the present mine produces, its yield being not much more than one ounce per ton of ore. Therefore, the Defendant argues, these Acts must have included such mines as this, and, indeed, must have included all gold mines containing copper, because ore containing five ounces of gold per ton would not only be a gold mine, but an extraordinarily rich one. He supports the argument by like calculations as to the prices of tin, iron, and lead at the date of these statutes. The argument is ingenious. It is based upon the assumption that the quartz rock extracted from this mine is ore. That quartz rock containing only one ounce of gold per ton of the rock, and a small and unremunerative quantity of base metal, is ore within the meaning of these statutes is, to say the least of it, doubtful. At twelve ounces to the pound, one ounce is not one twenty-six thousandth part of a ton. Moreover, the ore for which the Crown is to pay is ore "washed, made clean, and merchantable," which strengthens the construction that the ore mentioned in the statute must be ore separated from the rock. In *Johnson's* Dictionary, which was written about the middle of the last century (1755) "ore" is described as "metal," or "metal unrefined—metal yet in its fossil state." And he quotes from

C. A. 1891

ATTORNEY-GENERAL v. MORGAN.

Kay, L.J.

Spenser, who wrote at the end of the sixteenth century, about one hundred years before these statutes :—

> "Round about him lay on every side
> Great heaps of gold that never would be spent,
> Of which some were rude ore not purified
> Of Mulciber's devouring element." (1)

If "ore" be read "metal in its crude state separated from the rock," the illustration of the Defendant entirely fails. Moreover, when the Defendant alleges that "ore" (that is, according to his construction, rock) containing 5 per cent. of copper is merchantable, he means that it is merchantable now with all the improvements of manufacture perfected in these mining days, not that it would have been merchantable at the end of the seventeenth century. We have no evidence in support of these calculations of the Defendant; but in trying the meaning and effect of these statutes I will assume them to be accurate.

The first question is the grammatical construction of these Acts, and especially the 5 Wm. & M. c. 6. It seems to me reasonably clear that the first Act (1 Wm. & M. c. 30) was only passed to encourage mining for the base metals therein particularly mentioned, and does not refer to a mine which is worked for gold, although such mine may contain a certain quantity of such base metals, or of some of them. The second statute (5 Wm. & M. c. 6) is expressed to be enacted for the better explanation of the former Act. *Primâ facie*, therefore, it can only refer to the same mines as are mentioned in that statute. No doubt in the enacting part the language is changed to any mine "in which there is copper, tin, iron, or lead." It certainly does not refer to a mine in which none of those metals are found, although such mine might contain gold or silver. In fair grammatical construction, it appears to me that this statute only applies to mines of copper, tin, iron, or lead—that is, mines which are worked for the purpose of raising one or other of those metals, and the profit of which is mainly derived from such working. I do not think, if the Defendant's figures be right, that this grammatical construction is displaced. It only comes to this—the Crown has put such a price upon the ore as makes

(1) 'Faerie Queene,' Bk. II. Canto VII.

it certain that a man may safely mine for copper, tin, iron, and lead without danger of interference, unless it contains a very large proportion of gold. It does not follow that he may work a mine for gold, because there is with the gold a small quantity of copper, tin, iron, or lead. The Acts are dealing, not with gold mines, but with mines of copper, tin, iron, and lead only. What is such a mine is not determined by them, and there may, doubtless, be imagined a case where the yield was such that the value of the gold and copper per ton of ore was nearly the same, and where it would not pay to work the mines for one of these metals without the other, and it might be difficult in such a case to say whether the mine should be called a copper mine or a gold mine. Probably any Court before which the question came would be inclined to give the mine-owner the benefit of such a doubt. The case, however, with which we have to deal raises no such difficulty. The value of the base metals in this mine is quite inconsiderable. The mine is worked for nothing but gold. In the quartz rock containing the gold, and, it may be, in combination with the gold to some degree, there are lead and copper, and, perhaps, other base metals; but the mine is not worked for the purpose of recovering any of these, nor, according to the evidence, could it be profitably worked for such purpose. It is to all intents and purposes a gold mine, and worked as such. Such a mine is, in my opinion, a Royal mine, and is not affected by any of these statutes, and, accordingly, the Defendant has from the first been in the wrong. The decision of the learned Judge against him was right upon this point, and the appeal must be dismissed with costs.

Solicitors: *T. W. Gorst*, Solicitor to Commissioners of Woods, Forests, and Land Revenues; *Davidson & Morriss.*

M. W.

C. A.
1890
NORTH, J.
Dec. 12.
C. A.
1891
Jan. 20, 21.

In re HESELTINE.
WOODWARD *v.* HESELTINE.

[1890 H. 4395.]

Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43), *ss.* 8, 9, *and Schedule—Address of Attesting Witness—Names of Parties.*

The execution of a bill of sale was attested by "*W. G. C.*, clerk to the *D. Bank*, 6, *D. Street, Charing Cross.*" From the affidavit filed with the bill of sale it appeared that *W. G. C.*, though employed at the *D. Bank*, resided elsewhere:—

Held, by *North*, J., that the bill of sale was void, because the attestation did not state the residence of the attesting witness:

Held, on appeal, that the address given was sufficient, and that the bill of sale could not be avoided on that ground.

The grantee in a bill of sale was described as "the *D. Bank*, of 6, *D. Street, Charing Cross* (of which said bank *L. S.* of the same place is the sole proprietor)," and throughout the instrument the *D. Bank* was treated as the grantee, the name of *L. S.* not being again mentioned:—

Held, that the bill of sale was void as not being according to the form in the Act, for that one thing characteristic of the statutory form was that the name of the grantee should be given, that the name, therefore, ought to be given without ambiguity, and that in the present case there was no irresistible inference on the face of the bill of sale that *L. S.* was trading under the name of the *D. Bank*, and was the grantee.

THIS was an action brought by an unsecured creditor to administer the estate of *William Heseltine*, who died on the 2nd of December, 1890, intestate. The Defendants were the widow of the deceased, and *Lewis Simmons*, trading as the *Discount Bank of London*, the holder of a bill of sale on furniture dated the 12th of June, 1890, executed by the deceased in favour of the Defendant *Simmons*.

The claim endorsed on the writ was for administration and for a declaration that the bill of sale was void, and an injunction to restrain the Defendant *Simmons* from removing or selling the goods comprised in the bill of sale and for a receiver.

The bill of sale was dated the 12th of June, 1890, and filed on the 14th. It was expressed to be made between *Heseltine* of the one part "and the *Discount Bank of London*, of 6, *Duncannon Street, Charing Cross*, in the county of *Middlesex* (of which said bank *Lewis Simmons* of the same place is the sole proprietor), of

the other part," and thereby, "in consideration of the sum of £500 now paid to *W. Heseltine* by the said bank, the receipt of which the said *W. Heseltine* hereby acknowledges, the said *W. Heseltine* doth hereby assign unto the said bank and its assigns all and singular the chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £500 and interest thereon at the rate of 9*d.* in the pound per month. And the said *W. Heseltine* doth further agree and declare that he will duly pay to the said bank the principal sum aforesaid, together with the interest then due, by monthly payments of £30 on the 18th day of every month, the first payment to be made on the 18th of July next. Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said bank for any cause other than those specified in sect. 7 of the *Bills of Sale Act* (1878) *Amendment Act*, 1882."

The execution of the bill of sale by *Heseltine* was attested by "*William George Cleverly*, clerk to the *Discount Bank of London*, 6, *Duncannon Street, Charing Cross.*" In the affidavit of execution of the bill of sale made by the attesting witness filed with the bill of sale he described himself as "*William George Cleverly*, of 12x, *Peabody Avenue, Pimlico*, in the county of *Middlesex*," and went on to state *inter alia* that the name *W. G. Cleverly* subscribed to the bill of sale as attesting witness "is in the proper writing of me, this deponent, and I reside at No. 12x, *Peabody Avenue, Pimlico*, and am clerk to the *Discount Bank of London*, 6, *Duncannon Street, Charing Cross.*"

The Defendant *Simmons*, on the 3rd of December, 1890, took possession of the furniture, the subject-matter of the bill of sale. A motion was now made on the part of the Plaintiff to continue to trial an *ex parte* injunction that had been obtained restraining the Defendant *Simmons* from selling, disposing of, or removing any of the furniture.

The motion was heard before Mr. Justice *North*, on the 12th of December, 1890.

Napier Higgins, Q.C., and *Ingpen*, for the Plaintiff:—

The bill of sale is void on several grounds. The first is, that

C. A. 1891 *In re* HESELTINE. WOODWARD *v.* HESELTINE.

it does not contain the address of the attesting witness. It does, it is true, contain the description of the place where he is employed—that is, part of his description—and not his address, which means the place where he resides with his family. The formalities required by the later *Bills of Sale Acts* must be strictly observed, and want of such observance cannot be rectified by anything in the affidavit filed with the bill of sale: *Blankenstein* v. *Robertson* (1); *Parsons* v. *Brand* (2).

[The other grounds were not gone into.]

D. L. Alexander, for the Defendant Mrs. *Heseltine*.

J. Holmes Poulter, for the Defendant *Simmons*:—

A sufficient address of the attesting witness does appear on the bill of sale, namely, that of the *Discount Bank of London*, where he was employed and could be found.

[NORTH, J.:—Under the General Order IV., rule 1, it has been held that the address of a plaintiff to be endorsed on a writ means his residence and not his place of business: *Stoy* v. *Rees* (3).]

Under the *Bills of Sale Act*, 1854, it was held that the word "residence" in the phrase "residence and occupation" of a witness was satisfied by giving the address of the employer of a witness as being a place where he was to be found: *Attenborough* v. *Thompson* (4). If the Legislature had intended to require the residence of the witness to be stated, the word "residence" would have been used as it was in the *Bills of Sale Act*, 1878 (41 & 42 Vict. c. 31), s. 10, sub-s. 2.

In all common sense, where the place of business of the witness (usually a more fixed place than the private residence of a man in humble circumstances, and one from which he can be better traced) is given in the attesting clause—and in the accompanying document his place of residence is also given—there is sufficient fairly to satisfy the requirement of the Act. In *Greenham* v. *Child* (5), where a witness had three places of business, it

(1) 24 Q. B. D. 543.
(2) 25 Q. B. D. 110.
(3) 24 Q. B. D. 748.
(4) 2 H. & N. 559.
(5) 24 Q. B. D. 29.

was held that there was a sufficient description of him for the purposes of the Act where one of the places was named only—the one where he also resided.

NORTH, J.:—

I am not sure that if I had to look at this from a common-sense point of view only, I should not agree with Mr. *Poulter* in saying that when the affidavit stated the place where the witness carries on his daily avocation, that would be enough reasonably to satisfy the requirements. But it is not open to me under this Act to act upon common sense; I must look at what the Act says. Now the affidavit made by the attesting witness describes him as "*William George Cleverly*, of 12x, *Peabody Avenue, Pimlico*, in the county of *Middlesex*, clerk to the *Discount Bank of London*, 6, *Duncannon Street, Charing Cross.*"

Having first given the residence of the witness, the document proceeds to give his description; both those statements are perfectly accurate. But when we come to look at the attestation to the bill all we find is, "*William George Cleverly*, clerk to the *Discount Bank of London*, 6, *Duncannon Street, Charing Cross.*" In other words, he gives his description but omits his address. I do not doubt that if the description had been given before the address, the mere transposition of the order would have had no effect; but when we find the address of the witness's employer and not his own, it is quite clear that those words are merely part of his description. His address is, therefore, either carelessly or carefully left out.

Then with respect to the meaning of the word "address." Though I do not say that the case on the General Order I referred to as to the address of a plaintiff to be endorsed on a writ is conclusive on this case, the case of *Stoy* v. *Rees* (1) does shew the construction of the same word in the General Orders. Though I am satisfied there was no omission of the address with an intention of deceiving, I must hold that the Act was not complied with, and the cases cited, especially *Parsons* v. *Brand* (2), shew that the effect of the informality cannot be made good by any amplification in the affidavit. There will be an injunction.

(1) 24 Q. B. D. 748. (2) 25 Q. B. D. 110.

C. A. 1891

In re HESELTINE. WOODWARD *v.* HESELTINE.

Simmons appealed. The appeal came on for hearing on the 20th of January, 1891.

Bosanquet, Q.C., and *J. Holmes Poulter*, for the Appellant:—

Several objections have been made to the validity of the bill of sale in this case; but the only one on which the Judge has given a decision is the objection that the business address of the attesting witness was not a sufficient compliance with the statute. But there is nothing in the Act of 1878, or in the Act of 1882, which renders it necessary to give the place of residence of the witness; and the form in the schedule to the Act of 1882 merely requires the "address" to be given. We admit that the form must be strictly followed, but we say that the place where the witness passes the business hours of the day is his address in quite as strict a sense as the place where he sleeps. In construing the Act the object of requiring the address must be considered, and the only reason for inserting the address of the witness is that he may be found if his testimony is wanted. Even where "a description of the residence" of the grantor and witness was required to be inserted in the affidavit, as it was in the Act of 1854 (17 & 18 Vict. c. 36), s. 1, the business address has been held sufficient: *Blackwell* v. *England* (1) and *Attenborough* v. *Thompson* (2). *A fortiori* the business address is sufficient where the "address" is required: *Hewer* v. *Cox* (3); *Ex parte Breull* (4).

[LOPES, L.J., referred to *Alexander* v. *Milton* (5) and *Hickley* v. *Greenwood* (6).]

Napier Higgins, Q.C., and *Ingpen*, for the Respondents:—

The mention of the witness's business address is not a sufficient compliance with the statute. The cases in which the business address was held sufficient were under the Act of 1854, when strictness was not so much insisted upon as now. Under the present Act adherence to the form in the schedule is not a matter of form, but of substance. It is not correct to say that

(1) 8 E. & B. 541.
(2) 2 H. & N. 559.
(3) 3 E. & E. 428.
(4) 16 Ch. D. 484.
(5) 2 C. & J. 424.
(6) 63 L. T. (N.S.) 288.

the witness may be as easily found by reference to his business address. In the present case, for instance, he was a mere clerk, who might change his situation at any time, and the *Discount Bank of London* was not a well-established house, but a mere name given by *Simmons* to his business: *Thomas* v. *Kelly* (1); *Parsons* v. *Brand* (2); *Blankenstein* v. *Robertson* (3); *Stoy* v. *Rees* (4).

There is another objection to the bill of sale which was not argued in the Court below, but on which we now insist. There is no person named as grantee. The assignment purports to be made to the *Discount Bank of London*, which is neither a person nor a corporation. It is merely the name of the business which *Simmons* carried on. The Act requires the name of a person. The Act of 1878, s. 12, requires that the register shall contain the name of the person or persons to whom or in whose favour the bill is given. The Act of 1882, s. 16, speaks of the names, addresses, and occupations of the parties, and in the form in the schedule the assignment is made to "*C. D.*, his executors, administrators, and assigns." The *Interpretation Act* of 1889 (52 & 53 Vict. c. 63), s. 19, enacts that the word "person" shall include "a body of persons corporate or unincorporate"; but this bank is not within that definition. This is not a matter of form, but of substance, for the policy of the Acts requires certainty in the grantee; but such a name as the *Discount Bank of London* is well adapted for concealment. [They were then stopped by the Court.]

Bosanquet, Q.C., and *J. Holmes Poulter*, for the Appellant, on the point of the name of the grantee:—

The House of Lords in *Thomas* v. *Kelly* laid down that the statute does not make every word in the form imperative, and that the Court has some latitude in determining whether a bill of sale is "in accordance with the form." According to the Court of Appeal in *Ex parte Stanford* (5) the form is sufficiently followed if the bill of sale has precisely the same legal effect as

(1) 13 App. Cas. 506.
(2) 25 Q. B. D. 110.
(3) 24 Q. B. D. 543.
(4) Ibid. 748.
(5) 17 Q. B. D. 259, 270.

C. A. 1891 *In re* HESELTINE. WOODWARD *v.* HESELTINE.

the form in the Act. In *Bird* v. *Davey* (1), where the attestation clause to the execution by one of the grantors did not give the address of the witness, the Court of Appeal held the bill of sale to be duly attested, the attestation clause to the execution by the other grantor having the same signature, and giving the address of the witness. The Court held that there was an irresistible inference that the witness was the same. So here there is an irresistible inference on the face of the bill of sale that *Lewis Simmons* is the grantee. No ordinary business person would read the description of the party of the first part here as meaning anything else but that he was *Lewis Simmons*, carrying on business under the name of the *Discount Bank of London*. A person may be a party to a deed by an imaginary name, if in the deed he shews that the name represents a person whose true name is given, and that is done here. A grant to a partnership by the name of the firm, without stating who are the members, is good: *Lindley* on Partnership (2). The Acts do not contain any specific requisition as to the description of the grantee, and there is not the same reason for particularity as in the case of the grantor. The object of registration was to prevent the grantor from gaining credit by the possession of goods which he had secretly incumbered, and he therefore must be carefully identified; but the same reason does not apply to a grantee.

Napier Higgins, Q.C., having been stopped, was heard again:—

This is not a case of partnership, and, if it were, the rules would not help. Naming a person is not the same thing as naming the partners. By Order XVI., rule 14, two or more persons claiming or being liable as partners may sue or be sued in the name of the firm; but by rule 15 a single person carrying on business in the name of a firm may be sued in that name, but cannot sue in it. The grantee is here not properly described; extraneous evidence is wanted to shew that the grantee is not a corporation. The words "of which said bank *L. Simmons* is the sole proprietor," may denote that he is the holder of all the shares in an incorporated company, and cannot

(1) [1891] 1 Q. B. 29. (2) 3rd Ed. p. 215.

be treated as equivalent to "*L. Simmons*, trading in the name of, &c." If that was meant, why was it not said? The object of the Acts, as is shewn by many cases, is to ensure publicity, not merely as regards the grantor, but also as regards the grantee. Here the description of the grantee is uncertain and misleading. A firm is not a "*persona*": *Ex parte Blain* (1); and a corporation does not always come under that term: *Pharmaceutical Society* v. *London and Provincial Supply Association* (2). The form in the Act has been substantially departed from, and the bill of sale is void. Suppose *Simmons* died, to whom is the grantor to pay the money, the chattels having been granted to the bank or its assigns?

Bosanquet, in reply:—

It is quite out of the question that any one should be misled by the description in the present case. The Plaintiff sues *Simmons*, describing him as trading as the *Discount Bank of London*. The only question is whether the name is so given as to bring the bill of sale into accordance with the statutory form. In *Downs* v. *Salmon* (3), a misstatement of the name of the grantor was held not to invalidate a bill of sale.

LINDLEY, L.J.:—

This is an appeal by *Simmons*, the holder of a bill of sale, from an order of Mr. Justice *North*, granting an interim injunction to restrain him from selling or removing the goods therein comprised. The case was decided against him on the ground that the bill of sale was void because the proper address of the attesting witness did not appear upon it. Other objections were also taken which were not discussed in the Court below.

In the attestation clause the attesting witness is described as "*W. J. Cleverly*, clerk to the *Discount Bank of London*, 6, *Duncannon St., Charing Cross.*" In the affidavit filed with the bill of sale, he describes himself as "of 12x, *Peabody Avenue, Pimlico.*" The Plaintiff contends that in the attestation clause

(1) 12 Ch. D. 522, 533. (2) 5 App. Cas. 857.
(3) 20 Q. B. D. 775.

C. A. 1891 *In re* HESELTINE. WOODWARD *v.* HESELTINE. Lindley, L.J.

the witness ought to have given his place of residence; but that argument does not seem to me to be sound. The address given in the attestation clause was the place where he was employed all day: a letter addressed there would have reached him, and a person wishing to see him might have found him by going there, more readily than by going to the place where he slept. I think that the bill of sale cannot be held void on this ground.

Another objection was taken—that the bill of sale was void as not being in accordance with the form given by the statute. We all know the difficulty of construing sect. 9 of the Act. In construing it we must have recourse to the late authority of *Thomas* v. *Kelly* (1). Lord *Macnaghten* there says (2): "This section seems to me to deal with form, and form only. So purely is it, I venture to think, a question of form, that I should be inclined to doubt whether a bill of sale would not be void which omitted the proviso referring to sect. 7, though I cannot see that the omission would alter the legal effect of the document in the slightest degree, or mislead anybody. It has been held, and I think rightly, that sect. 9 does not require a bill of sale to be a verbal and literal transcript of the statutory form. The words of the Act are, 'in accordance with the form,' not 'in the form.' But then comes the question, When is an instrument which purports to be a bill of sale not in accordance with the statutory form? Possibly when it departs from the statutory form in anything which is not merely a matter of verbal difference. Certainly, I should say when it departs from the statutory form in anything which is a characteristic of that form." Now, one of the characteristics of the form is that the name of the grantee should be given, and it is important that there should be no ambiguity about the name. Here a bill of sale is given to a gentleman who lends money upon it. The grantee is described as "the *Discount Bank of London*, of 6, *Duncannon St., Charing Cross*, of which said bank *Lewis Simmons* of the same place is the sole proprietor." A marked distinction is here drawn between the *Discount Bank* and himself: he is stated to be the proprietor of the thing called

(1) 13 App. Cas. 506. (2) 13 App. Cas. 519.

the *Discount Bank of London*. We are asked to construe this bill of sale as made between *Heseltine* of the one part and "*Lewis Simmons*, trading under the style or firm of the *Discount Bank of London*," of the other part. That is not what the bill of sale says, and the distinction between himself and the bank runs through the document. The chattels are expressed to be assigned "to the said bank," and *Heseltine* agrees that he will pay the money "to the said bank." Can we, from what appears on the face of the bill of sale, without any extrinsic evidence, draw the irresistible inference that *Simmons* is the bank? I think we cannot, and I am therefore of opinion that the bill of sale departs from the statutory form in an essential point, and is void under the Act.

LOPES, L.J.:—

I entirely agree. As to the attesting witness, I think that the Court below came to an erroneous conclusion, and that the address was sufficient. The object of requiring the address to be given is to give such information as would enable a person to find the witness. A letter addressed to 6, *Duncannon Street*, would find him, and a person wishing to see him would more readily find him there than at the place where he slept.

The other point, that the bill of sale is not in accordance with the statutory form, is of more importance. It is urged that it is not in accordance with the scheduled form, because the description of the grantee is not clear. If the grantee is described in a way likely to mislead, I think that the bill of sale is not in accordance with the form, and is void. In *Ex parte Stanford* (1) it is said, "A bill of sale is surely in accordance with the prescribed form if it is substantially in accordance with it, if it does not depart from the prescribed form in any material respect. But a divergence only becomes substantial or material when it is calculated to give the bill of sale a legal consequence or effect, either greater or smaller, than that which would attach to it if drawn in the form which has been sanctioned, or if it departs from the form in a manner calculated to mislead those whom it is the object of the statute to protect." I think that the present

(1) 17 Q. B. D. 259, 270.

C. A. 1891 *In re* HESELTINE. WOODWARD *v.* HESELTINE. Lopes, L.J.

bill of sale does depart from the form in a manner calculated to mislead those whom it is the object of the statute to protect. The description of the grantee is such as to raise an ambiguity, and I think an intentional ambiguity. It appears to me that on the face of the instrument there is nothing from which an irresistible inference is to be drawn that *Simmons* is the bank, or that the bank is not a corporation. I think, therefore, that the order appealed from is right. The case is distinguishable from *Bird* v. *Davey* (1) on the ground that in that case there was, in the opinion of the Court, an irresistible inference from what appeared on the bill of sale itself that the same person attested the execution by both grantors, and, if so, the statute was satisfied by his address being once given.

KAY, L.J.:—

There are two points settled by decision. First, that the words "in accordance with the form" have not the same effect as "in the form." This was laid down by the House of Lords in *Thomas* v. *Kelly* (2). It is difficult to define the degree of latitude which the Act allows; but all the Lords agreed that some departure from the words of the form was allowable. Secondly, it was decided in *Bird* v. *Davey*, that an imperfection on the face of a bill of sale which was corrected by other information supplied by the document itself did not invalidate the bill of sale. Here the description of the grantee is "the *Discount Bank of London*, of which bank *L. Simmons* is the sole proprietor." The *Discount Bank of London* might be the name of a corporation, and is there any irresistible inference from what appears on the bill of sale that it was not? Unless there is such inference *Bird* v. *Davey* does not apply, and the bill of sale is bad. If the description had been "the *Discount Bank of London*, which is not a corporation but a firm, in which *L. Simmons* is the sole partner," I do not say how the case would have stood. That is not the language used; but a description is given which might denote a joint stock company in which *Simmons* held all the shares; and to say that there is any irresistible inference that the "*London Joint Stock Bank*" was the

(1) [1891] 1 Q. B. 29. (2) 13 App. Cas. 506.

trade name of *Simmons* is going too far. I think, therefore, that there is a substantial departure from the statutory form, and that the bill of sale is invalid.

C. A. 1891 *In re* HESELTINE. WOODWARD *v.* HESELTINE.

Solicitors for Plaintiff and first Defendant: *Leggatt, Rubinstein & Co.*

Solicitor for Defendant *Simmons*: *Simmons.*

H. C. J.

In re JOSHUA STUBBS, LIMITED. BARNEY *v.* JOSHUA STUBBS, LIMITED.

C. A. 1891 *Jan.* 24.

[1890 B. 4202.]

Company — Winding-up — Practice — Debenture-holder's action — Receiver — Official Liquidator—Receiver and Manager—Displacing Receiver by Liquidator—Discretion of Court.

As a general rule of convenience, where, upon a company having been ordered to be wound-up, the Plaintiff in a debenture-holders' or mortgagees' action applies to the Court for the appointment of a receiver, and an application is also made in the winding-up for the appointment of a liquidator, the Court will, in the exercise of its discretion, appoint a liquidator to act in both capacities.

Also, where the debenture-holders or mortgagees have, either before or after the winding-up, obtained an order in their action appointing a receiver, and subsequently a liquidator is appointed in the winding-up, the Court will ordinarily in the exercise of its discretion appoint the liquidator in the place of the receiver, to act as receiver as well as liquidator, upon the ground that, under the winding-up machinery provided by the *Companies Acts*, the liquidator can get in such outstanding assets more expeditiously and with less expense than the receiver; but it will not in general do so where there is no substantial amount of calls and similar assets outstanding.

But where a receiver has been appointed by the debenture-holders or mortgagees themselves under a power given them by their security, the Court will not displace him by the liquidator.

Semble, if in the debenture-holders' or mortgagees' action an order has been made appointing a person manager of the company's business as well as receiver, the Court will, in case the business is one that can still be carried on, appoint the liquidator to act as both receiver and manager in his place.

Where a judge of first instance has, in the exercise of his discretion, refused to displace a receiver by a liquidator, the Court of Appeal will not,

C. A.
1891
In re JOSHUA STUBBS, LIMITED.
BARNEY *v.* JOSHUA STUBBS, LIMITED.

in the absence of special circumstances to justify their so doing, interfere with that exercise of discretion.

Decision of *Kekewich*, J., affirmed.

In re Henry Pound, Son & Hutchins (1) discussed.

THIS was an appeal by the official liquidator of *Joshua Stubbs, Limited*, from the decision of Mr. Justice *Kekewich* (2).

It is only necessary to add to the statement of facts contained in the former report, that the order of the 2nd of October, 1890, appointing the receiver—Mr. *Fisher* by name—appointed him also "manager;" but he never in fact acted as manager, in consequence of the company's business having been stopped by an injunction in an action against them for nuisance.

The particulars as to the amount of the company's capital remaining uncalled, mentioned below at the close of the arguments on the appeal, were not brought to the attention of the Court below.

Renshaw, Q.C., and *Ashton Cross*, for the Appellant:—

In the case of a winding-up, the regular and uniform practice has been, where a receiver has been appointed in a debenture-holder's action, to appoint the liquidator in his place.

[KAY, L.J.:—How do you get over *In re Henry Pound, Son & Hutchins*?]

The distinction between that and the cases which have established or recognised the above rule or practice, is that there the receiver was appointed by the debenture-holders themselves under the powers contained in their security, and not by the Court, as is the case here. The distinction is pointed out and the rule recognised by the Lords Justices *Cotton* and *Fry* (3).

[KAY, L.J.:—The rights of the debenture-holders are superior to those of the liquidator.]

We admit that; and if it were necessary for the protection of the debenture-holders that their action should continue, that might be a reason for not interfering with the receiver, as in *In re David Lloyd & Co.* (4), where the mortgagee's title was con-

(1) 42 Ch. D. 402.
(2) *Ante*, p. 187.
(3) 42 Ch. D. 419, 422.
(4) 6 Ch. D. 339.

tested by the liquidators; but here the liquidator and also *Abbott*, who stands in the position of second mortgagee and appears as a Respondent on this appeal, are willing to give the debenture-holders, the Plaintiffs in the action, all the relief that they ask; and, therefore, they can be put in the same position as if the action went on. Thus there can be no possible reason for continuing the action or leaving the receiver in possession for that purpose. The rights of the debenture-holders being therefore admitted, it is not necessary to have more than one person to give effect to them, and that person should be the official liquidator, who is the proper person to be entrusted with the administration of the company's property. The expense should be avoided of employing two persons to do the same thing.

The rule that one official should represent both the company and the debenture-holders or mortgagees is recognised not only in *In re Henry Pound, Son & Hutchins* (1), but also in *Perry* v. *Oriental Hotels Company* (2), *Campbell* v. *Compagnie Générale de Bellegarde* (3), and more recently in *Tottenham* v. *Swansea Zinc Ore Company* (4); and the practice is so stated in *Buckley* on Companies (5).

[Kay, L.J.:—Practically this is an application by the mortgagor to remove the mortgagees' receiver.]

But the liquidator is bound to act according to the direction of the Court, so that the mortgagee is amply protected. The rule is further recognised in *Willmott* v. *London Celluloid Company* (6), where the liquidator was appointed receiver.

[Lindley, L.J.:—But not in the place of an existing receiver; there was no receiver to remove.]

The case is an authority that the Court will have only one officer.

Bartlett v. *Northumberland Avenue Hotel Company* (7), which was cited in the Court below by the other side, no doubt says that there is no settled rule for displacing the receiver by the

(1) 42 Ch. D. 402.
(2) Law Rep. 5 Ch. 420.
(3) 2 Ch. D. 181.
(4) 32 W. R. 716.
(5) 6th Ed. p. 266.
(6) W. N. (1885), p. 29; 52 L. T. (N.S.) 642.
(7) 53 L. T. (N.S.) 611.

C. A. 1891 *In re* Joshua Stubbs, Limited. Barney *v.* Joshua Stubbs, Limited.

liquidator; but as a matter of uniform practice, the Court does appoint the liquidator as receiver, directing him to keep separate accounts. And the Court did in fact in that case remove the receivers in the action and appointed the liquidators in their place upon the express ground that there were outstanding calls which could be collected more expeditiously and less expensively than by the receivers.

[Kay, L.J.:—A liquidator might incur a much greater amount of costs than a receiver; for instance, he might bring actions—and who could prevent him getting his costs? It might be difficult to distinguish between his costs as liquidator and his costs as receiver.]

The Taxing Master would find no difficulty in distinguishing the costs. We ask the Court to avoid the absurdity of a liquidator and a receiver going on side by side, which can only mean unnecessary costs.

The liquidator has much greater facilities for administering the estate than the receiver; for instance, an order for sale in the action could only be obtained by the receiver after the action had proceeded to a certain stage, whereas in the winding up the liquidator could obtain an order for sale at once, without any delay. Again, a receiver does not possess the powers vested in an official liquidator under the *Companies Acts*, such as the powers of settling the list of contributories and making calls; and it is for that reason, as illustrated in *Bartlett* v. *Northumberland Avenue Hotel Company* (1), that the Court has adopted the practice of appointing the official liquidator in the place of the receiver. The liquidator must to some extent be the agent of the mortgagee, even though there may be a receiver, for, if the charge is on the uncalled capital, it is the liquidator who has to get in that uncalled capital, a duty which cannot be performed by the receiver, for he cannot settle the list or make calls. Again, the official liquidator being an independent person, appointed to act for all parties, is likely to be more impartial than the receiver, who acts for one party only, the mortgagee. There can be no difficulty in the liquidator, if acting as receiver

(1) 53 L. T. (N.S.) 611.

also, keeping separate accounts in respect of his separate functions. The appointment of two separate officials must cause divided responsibility and divided authority, and thus lead to questions and difficulties, as is pointed out in *Tottenham* v. *Swansea Zinc Ore Company* (1); the only result being double expense and double litigation.

Swinfen Eady, for the Respondent, *Abbott*, did not oppose the appeal.

R. J. Parker (*Warmington*, Q.C., with him), for the Respondents, the Plaintiffs in the action:—

The question whether the liquidator should be appointed in the place of the receiver, is one entirely for the discretion of the Court; and that discretion, when exercised, should not be interfered with: *Bartlett* v. *Northumberland Avenue Hotel Company* (2).

At this point of the argument, the Court inquired what was the amount of the company's uncalled capital; when it was stated, and admitted on both sides, that the only capital now remaining uncalled consisted of eighteen shares of £10 each, or £180 in all. The Court thereupon said they did not desire to hear further argument on behalf of the Respondents, and proceeded to give judgment.

LINDLEY, L.J.:—

This case at one time seemed to be one of some difficulty and to require a careful consideration of the authorities. It is an application by the official liquidator of *Joshua Stubbs, Limited*, that an order of the 2nd October, 1890, appointing a receiver in a debenture-holder's action may be discharged, on the liquidator undertaking to keep a separate account on behalf of the debenture holders; or, in the alternative, that the liquidator may be appointed receiver for the Plaintiffs in the place of the existing receiver.

As the case was opened by Mr. *Renshaw* and Mr. *Ashton Cross*

(1) 32 W. R. 716. (2) 53 L. T. (N.S.) 611.

C.A. 1891 *In re* Joshua Stubbs, Limited. Barney *v.* Joshua Stubbs, Limited. Lindley, L.J.

on behalf of the liquidator, it assumed this position—that the Court was really employing two officers to realize the same property, namely, Mr. *Fisher* as receiver for the debenture-holders, and Mr. *Hill* as official liquidator in the winding-up. If there had been nothing more in the case than that, I should have been prepared to say that it was not covered either by *In re David Lloyd & Company* (1), or by *In re Henry Pound, Son & Hutchins* (2), and that it fell within the other line of authorities beginning with *Perry* v. *Oriental Hotels Company* (3), and ending with *Tottenham* v. *Swansea Zinc Ore Company* (4). I say that for this reason, that *In re David Lloyd & Company* did not involve the consideration of the appointment of a receiver at all. The question there was whether a mortgagee who had commenced a foreclosure action should be allowed to continue it notwithstanding the winding-up, and it was held that he was entitled to leave to do so. That is a well-settled decision, and it has never been questioned; but it does not deal with this particular point.

The case of *In re Henry Pound, Son & Hutchins*, which at first sight may seem like this, has been distinguished by Lord Justice *Cotton*. The facts are entirely different from those here. There the debenture-holders had, by the terms of their contract, a right to appoint their own receiver; and then, it having become necessary to appoint a receiver, they appointed one themselves under their power: the receiver was not appointed by the Court and was in no sense an officer of the Court. But a winding-up order having been made, the receiver could not touch the assets of the company, and the sanction of the Court had therefore to be obtained to his taking possession as receiver, and an application was made for that purpose. Mr. Justice *Kay* thought that the application ought to be refused, and that the liquidator ought to be appointed receiver, but the Court of Appeal differed from him. In giving judgment on the Appeal, Lord Justice *Cotton* shows the distinction very plainly between the case of a receiver appointed under a power given to the debenture-holders and the case of a receiver appointed by the Court; for he

(1) 6 Ch. D. 339.
(2) 42 Ch. D. 402.
(3) Law Rep. 5 Ch. 420.
(4) 32 W. R. 716.

says (1): "The argument has been this, that in this case, if the receiver is only to have such a power as a receiver appointed by the Court in an action would have, he must be treated for the purposes of this application as if he were a receiver appointed by the Court. That appears to me to be entirely missing the point. If the Court appoints a receiver at the instance of a mortgagee, the mortgagee not having, without the assistance of the Court, power to appoint a receiver, then the Court exercises its discretion as to who shall be appointed receiver, and appoints the receiver whom it thinks best to appoint for the interest of the mortgagee and of the mortgagor, a person who, having regard to the interests of both parties, the Court considers the best person. And when a company is being wound up, whether there is a winding-up at the time the receiver is appointed by the Court or afterwards, then the Court says, 'It is quite useless to have the expense of two receivers; the liquidator who is, in fact, in some senses a receiver, and another receiver appointed in this action.' There the Court exercises its discretion as to whom it is to appoint. But those cases do not at all apply, in my opinion, where a receiver who is asking to be let into possession, has not been appointed by the Court, but is appointed by the mortgagees under the exercise of the power given them by the mortgage deed. In such a case it is not left to the Court to determine who shall be the receiver best for the interest of all parties, but the mortgagee comes and says, 'My deed enables me to appoint A. B., and I have appointed him and I ask the Court to let him into possession; that being one of the powers which were given to the receiver by the deed; I do not want a receiver appointed by the Court, but a receiver appointed under the powers conferred by the deed under which I claim.'"

So that there the Lord Justice himself points the distinction which exists between such a case as the present and that which was before him. Accordingly, in such a case as this, in the absence of any special evidence, I should think the Court could, consistently with the decision in *In re Henry Pound, Son & Hutchins* (2), accede to the liquidator's application. I do not think the observations of Lord Justice *Giffard* in *Perry* v. *Oriental*

(1) 42 Ch. D. 419. (2) 42 Ch. D. 402.

C. A.
1891
In re JOSHUA STUBBS, LIMITED.
BARNEY *v.* JOSHUA STUBBS, LIMITED.
Lindley, L.J.

Hotels Company (1) are in any way touched by the later authorities; and therefore, in my opinion, the Court would under ordinary circumstances, as I have intimated, be disposed to accede to such an application as this. But in this case, there is this curious circumstance that makes the application of the rule unnecessary here—that there is practically nothing for the liquidator to do; that is to say, he has only to get in a sum of £180 from the shareholders. As Mr. Justice *Kekewich* has said, there is nothing in the circumstances to justify the Court in displacing the receiver; and, under the circumstances, I am not prepared to disturb the order made by the learned Judge in the exercise of his discretion. The appeal therefore fails.

KAY, L.J.:—

I am glad this case has come before the Court of Appeal, and that the Court has had an opportunity of expressing its opinion that the two cases of *In re David Lloyd & Co.* (2) and *In re Henry Pound, Son & Hutchins* (3) were not intended to alter and have not altered the rule of convenience which the Court has adopted, namely, that where an application is made to the Court to appoint a receiver, and another application is made to appoint a liquidator, the Court will take care, in order to avoid trouble and expense, that the receiver and the liquidator shall be the same person in every case where that can properly be done. That has been done in a great many cases noticed in the books, and I have no doubt in a still greater number of cases not noticed in the books: and the convenience of the rule is quite plain, for, supposing a receiver were appointed by the Court on behalf of a mortgagee, and then there came a winding-up, with calls to be made and outstanding assets of that kind to be got in, although future calls were included in the mortgage and although the debentures might be sufficiently large in terms to cover them, yet the receiver appointed by the Court on behalf of the mortgagee would have no power to get in assets of that kind. Without the sanction of the Court the receiver would have no right to bring an action or to take proceedings for the particular purpose he had in view; but in a winding-up there is machinery

(1) Law Rep. 5 Ch. 420. (2) 6 Ch. D. 339. (3) 42 Ch. D. 402.

provided that can be set in motion by the liquidator for the purpose of making calls in the liquidation and getting in outstanding assets of that kind through the simple and convenient method of what is very well known in chamber-practice as a balance-order against a shareholder. Now, if there is a large quantity of outstanding assets in the shape of capital not called up, and it therefore becomes necessary that this cheap and expeditious mode of getting in those assets should be put in action, then there would be very strong reasons for making the same person receiver and liquidator, because he is then armed with the power the official liquidator has of using this machinery for the benefit of the mortgagee. If this had been a case of that kind, I confess, I should have been strongly inclined to interfere with the exercise by the learned Judge below of his discretion; but it turns out that the only uncalled capital of this company consists of eighteen shares of £10 each, or a sum of £180 altogether; so that to suppose that there is anything special for the liquidator to do is out of the question, and therefore the only reason for displacing the receiver and appointing the liquidator in his place fails.

It appears that the receiver appointed on behalf of the mortgagee has been appointed also manager of the business, but we are told that there is no business to carry on at all. If there were any business to be carried on, I confess that would be, to my mind, a strong reason for appointing the same person official liquidator and also receiver and manager. The official liquidator would be much more qualified to carry on the business than the mortgagee's receiver would be.

The conclusion we come to is this. The receiver of the mortgagee has been appointed; he is in possession; there is no special reason for removing him. This is, in fact, an application for removing him and appointing the official liquidator in his place. One matter to be considered is that in the exercise of the special powers vested in him, the liquidator might incur considerable costs, and if the two offices were combined it would be a question how much of those costs should be charged against the mortgagee. I should be loth to allow those costs without some strong reason.

C. A. 1891 *In re* Joshua Stubbs, Limited. Barney *v.* Joshua Stubbs, Limited.

Upon the whole, I agree with what has been said by Lord Justice *Lindley*, that where the Judge below has exercised his discretion, and there is no sufficient reason for interfering with that discretion as he has exercised it, this Court ought not to interfere. Accordingly, in my opinion, this appeal must be dismissed with costs.

Solicitors: *Field, Roscoe & Co.*, agents for *Smith, Pinsent & Co., Birmingham; H. Fereday*, agents for *Reece, Harris & Harris, Birmingham; Taylor, Hoare & Box*, agents for *Horton, Lee, & Lee, Birmingham.*

G. I. F. C.

C A. 1891 *Jan.* 12, 14, 26.

JENKINS *v.* BUSHBY.

[1890 J. 557.]

Practice—Trial by Jury—Action in Chancery Division—Rules of Supreme Court, 1883, *Order* XXXVI., *rr.* 6, 7.

The words "in any other cause or matter" in Order XXXVI., rule 6, do not mean in any cause or matter other than one in which the mode of trial has been fixed under rules 2–7, but mean in any cause or matter other than those mentioned or referred to in those rules. Rule 6, therefore, does not apply to an action in the Chancery Division, and a party to such an action cannot claim a trial by jury as a matter of right. In such an action the Court may under rule 7 direct a trial by jury, but the *onus* is on the party applying for it to shew that the action is one which ought to be so tried.

An action was brought in the Chancery Division for an injunction to restrain trespass on mines and for an account of minerals gotten. *Glamorganshire* was named as the place of trial. The case turned on the question whether the land from which the minerals had been gotten was part of the Plaintiff's estate or part of the waste of the manor. The Plaintiff applied for a trial at *Cardiff* by a special jury. *Stirling*, J., on the ground that the case would involve an examination of many documents, ordered the action to be tried at *Cardiff* Assizes without a jury:—

Held, on appeal, that though the Plaintiff could not claim a jury as a matter of right, the importance of a view was so great that a trial by jury ought to be ordered.

THE statement of claim alleged that the Plaintiff *Jenkins* was owner in fee of the surface of certain specified lands in *Glamorganshire*, and that *Jenkins* and his co-Plaintiff, *T. J. Thomas*, were

tenants in common of the minerals under them; that the Defendants, *Bushby* and *Thomas*, lords of the manor of *Tyr-y-Arll*, and the Defendant company, their lessees, alleged that the lands were waste lands of the manor, and that the Defendants were entitled to work the mines under them. This action was commenced for an injunction to restrain the Defendants from working or getting coal or minerals from under the lands in question, and from conveying any minerals or other things under, through, or over the lands without the license of the Plaintiffs. The Plaintiffs also claimed an account of all minerals got by the company from under the lands and payment of what should be found due; an account of rents and royalties received by the Defendants, *Bushby* and *Thomas*, in respect of minerals got from the Plaintiffs' lands; an inquiry what minerals not gotten in the Plaintiffs' lands had been carried through, under, or over the Plaintiffs' lands, and what ought to be paid for wayleave. And if and so far as might be necessary to have the boundary between the Plaintiffs' lands and the waste land of the manor ascertained.

The writ was issued in the Chancery Division, and *Glamorganshire* was named as the place of trial.

The lords of the manor by their statement of defence alleged that only an inclosure of about eighty acres was the freehold property of the Plaintiffs, and that the greater part of the lands which the Plaintiffs alleged to belong to them were part of the waste of the manor and belonged to the lords, subject only to the rights of the commoners; and that the mines under the land which really belonged to the Plaintiffs had not been interfered with. The case of the lessees was similar.

On the 11th of November, 1890, the Plaintiffs gave notice of trial for the next assize at *Cardiff*, and took out a summons for an order that it might be tried at that assize by a judge with a special jury.

Evidence was given that the investigation of a great number of documents would be required at the trial which was relied upon as an objection to a trial by jury. On the other hand, it was urged that a view of the premises, which could not be had on a trial by a judge without a jury, was of very great importance. Mr. Justice *Stirling* in Chambers made an order that the action

C. A. 1891 JENKINS v. BUSHBY.

should be tried by a judge without a jury at the next assize for *Glamorganshire*. The Plaintiffs appealed direct from Chambers.

Sir *Edward Clarke*, S.G., *J. G. Wood*, and *David Lewis*, for the Appellants:—

The Plaintiffs had an absolute right under rule 6 of Order XXXVI. to have an order made for the trial of this action with a jury.

But if not, the Court had power under rule 7 of the same order to direct the trial to be with a jury; and this is just the kind of case in which the Court ought to have exercised its discretion in favour of the Plaintiffs. It is very unusual for the Court, when it sends a case to be tried at the assizes, to direct it to be tried without a jury. In this particular case the main question in dispute between the Plaintiffs and the Defendants is one of boundary, and a view is absolutely necessary for the proper determination of it. The locality is on a hillside about twenty miles from *Cardiff*. The inspection would require several hours, and it is not usual for, and could not be expected from, a judge of assize, that he could spare time for or undergo the task of such an inspection. On the other hand a special jury of the county of *Glamorgan*, where the venue is laid, would be the best tribunal to try the case, for they might readily visit the place, and the special knowledge which they would possess would be of great value.

In *Wedderburn* v. *Pickering* (1), *Jessel*, M.R., said that the right of a party to have his action tried by a jury ought not to be taken away by mere caprice, "but only when there is some reason why the case cannot be conveniently tried before a jury."

[They also referred to *Attorney-General* v. *Vyner* (2)].

Hastings, Q.C., and *O. L. Clare*, for the Respondents, *H. J. Bushby* and *C. Evan Thomas*:—

Rule 6 of Order XXXVI. does not apply to the present case at all.

The action is one for an account of minerals taken by the Defendants, and it involves a lengthy and minute examination of documents which cannot be conveniently made by a jury.

(1) 13 Ch. D. 769. (2) 38 W. R. 194.

Rules 4 and 7 are those which are applicable to the present case; at all events rule 7. In both these rules it is within the discretion of the Court whether to direct a trial with a jury or not. The Court has in this case properly exercised its discretion, and its order ought not to be interfered with. It is very likely of vital importance for the Appellants to have the case tried by a Welsh jury; but the burden is on them to shew that the discretion of the Court below has been wrongly exercised.

This case is on all-fours with *Attorney-General* v. *Vyner* (1), which went on the ground that the plaintiff had chosen the Chancery Division, and had not discharged the *onus* which lay upon him to shew that the action should not be tried in the ordinary Chancery way. The case was treated as coming within Order XXXVI., rule 4, and *The Temple Bar* (2) proceeds on the same footing.

[LOPES and KAY, L.JJ., expressed an opinion that this rule does not apply to the trial of an action, but only of particular questions or issues in it.]

Order XXXVI., rules 2–7, first deals by rule 2 with certain actions in which either party may demand a jury as of right; rule 3 deals with actions assigned to the Chancery Division, of which this action is not one. Then, to see whether a case comes within rule 4, it must be determined whether the action is one which could before the *Judicature Acts* have been tried without a jury without consent of the parties. In *Coote* v. *Ingram* (3) it was decided that an action in the Chancery Division answered this description. It was not within rule 3, because it was an action which could be brought in either Division. The case there is not one where a jury can be claimed as of right.

As to discretion, the Judge has held that the case can best be tried by a Judge without a jury; and the Court will be slow to interfere with his discretion. If not tried before a Judge, it would be tried best by a referee.

At all events, the Court may refuse to interfere with the order unless the Appellants will agree to a reasonable order.

Dunning, for the company.

(1) 38 W. R. 194. (2) 11 P. D. 6. (3) 35 Ch. D. 117.

C. A.
1891
JENKINS v. BUSHBY.

Sir *E. Clarke*, S.G., in reply:—

If this order stands, the case cannot be tried at all at these assizes, and great expense will be incurred for no purpose. As to trial by a referee, the observations of Lord *Esher* in *Ormerod* v. *Todmorden Joint Stock Mill Company* (1) should be borne in mind. As to rule 6, I suggest the true construction of "any other cause or matter" to be "other than those in which the mode of trial is fixed by the preceding rules or has been determined under them"; not "other than causes and matters mentioned in the preceding rules." The decision in *The Temple Bar* (2) can be referred to the ground mentioned by Lord Justice *Kay*, in *Fennessy* v. *Rabbits* (3), and so understood it is not against the construction for which I contend.

[LINDLEY, L.J.:—That construction is hardly reconcileable with *Attorney-General* v. *Vyner* (4) and *Timson* v. *Wilson* (5), and would give a right to a jury in a mass of cases where no such right previously existed.]

[*Coles* v. *Civil Service Supply Association* (6) was also referred to.]

J. R.

1891. Jan. 26. LINDLEY, L.J.:—

This is an action brought by one mineowner against another for an injunction and an account. The Plaintiffs' mine is in *Glamorganshire*; the Plaintiffs issued their writ in the Chancery Division and named *Glamorganshire* as the place of trial.

The Plaintiffs in due course applied for an order that the action might be tried at the next *Glamorganshire* Assize by a Judge with a special jury. This was opposed by the Defendants, who objected to trial by a jury, and Mr. Justice *Stirling* made an order that the action should be tried at the next *Glamorganshire* Assize by a Judge without a jury. From this order the Plaintiffs have appealed. They contend, first, that they have a right to a trial by a jury under Order XXXVI., rule 6, and, secondly, that if that rule does not apply, this case is one in

(1) 8 Q. B. D. 664, 679.
(2) 11 P. D. 6.
(3) 56 L. T. (N.S.) 138.
(4) 38 W. R. 194.
(5) 38 Ch. D. 72.
(6) 32 W. R. 407; 53 L. J. (Ch.) 638.

which the Judge could have ordered trial by jury under rule 7, and that he ought to have made such an order in this particular case, inasmuch as the question in dispute between the parties is one of boundary, and that a view of the locality is essential for the proper determination of that question. The Defendants, on the other hand, contend that rule 6 does not apply, and that this case is one which requires prolonged examination of documents, which cannot be conveniently made with a jury, and that the case falls within rules 5 and 7, and that the Judge had a discretion as to the order which ought to be made, and that such discretion was properly exercised, or, at all events, ought not to be interfered with.

It becomes necessary, therefore, first to consider whether rule 6 applies; for, if it does, then it follows that the Plaintiffs are entitled to a trial by jury as a matter of right. Now, rule 6 has been frequently considered, and there are decisions by this Court upon it—viz., *The Temple Bar* (1), *Timson* v. *Wilson* (2), and *Fanshawe* v. *London and Provincial Dairy Company* (2). There is also the decision of Mr. Justice *Chitty* in *Coote* v. *Ingram* (3), which was pronounced after *The Temple Bar Case* and before *Timson* v *Wilson*. The construction put upon rule 6 has been that the words "in any other cause or matter" do not mean in any cause or matter other than one in which the mode of trial has been fixed under the preceding rules, but mean in any cause or matter other than those mentioned or referred to in the preceding rules; and the reason for this construction is that if it were not adopted a great and wholly unintended change would have been made of trial in a very large number of actions brought in the Chancery Division. As pointed out in *Timson* v. *Wilson*, the rules 2 to 7 of Order XXXVI. must be read together; they form a code on this subject. Wherever there was, before the *Judicature Acts*, a right to a trial by jury, such right still exists, and where there was no such right before there is none under the rules, although in such cases power is given to the Court to direct a trial by a jury if in its opinion that mode of trial ought to be adopted. That this is the true effect of the

(1) 11 P. D. 6. (2) 38 Ch. D. 72.
(3) 35 Ch. D. 117.

C. A. 1891 JENKINS v. BUSHBY. Lindley, L.J.

rules will be seen by going through them one by one. Rule 2 preserves the right to a jury in the actions there mentioned, and there is no power to try them otherwise if either party desires a jury. Rule 3 applies to cases assigned to the Chancery Division by sect. 34 of the *Judicature Act*, 1873. In these cases there was no right to a trial by a jury, and no such right is conferred by the rules, but power is conferred on the Court to direct a trial by jury even in these cases. Rule 4 applies to causes or matters which before 1873 could be tried without a jury without any consent of parties. It has no application to old Common Law actions; but it applies to all Chancery actions and to old Admiralty actions. Rule 4 does not say how these actions are to be tried; that matter is dealt with by rule 7. Rule 4 only authorizes trial without a jury of one or more issues arising in such actions as I have just mentioned. The old Court of Chancery had power to direct issues to be tried with a jury, but I never heard of any issue being directed to be tried without a jury. Whether the old Court of Admiralty had power to direct issues to be so tried I do not know. The power to direct issues to be tried with a jury in non-jury actions is preserved by rule 7 (*a*). Rule 5 merely preserves the old practice of the common law Courts; there always was power in such actions as are there mentioned to order a trial without a jury. This rule has no application to actions which apart from it are properly triable without a jury. Rule 6 is supplementary to rule 2, and was necessary in order to preserve the right to trial by jury in all pure Common Law actions besides those mentioned in rule 2. Rule 6 is qualified by rule 5, but it has no reference to rule 4 except this—viz., that the causes or matters mentioned in rule 4 are excluded from the operation of rule 6. To construe rule 6 as applicable to all actions except those mentioned in rules 2, 3, and 5 would, as already stated, be to give a right to a trial by jury where there was no such right before—*e.g.*, in all Chancery actions except those mentioned in rule 3, and in old Admiralty actions. Such a construction is quite inadmissible. Rule 7 applies to all actions in the High Court except those in which either party has a right to a trial by jury and has insisted on such right in the mode prescribed by rules 2 or 6. Actions

assigned to the Chancery Division fall within rule 3, and, although rule 7 is wide enough to cover them, there is no discrepancy between the two rules. Rule 7 is so worded as that, in all cases to which it applies, the mode of trial is to be without a jury unless otherwise ordered, and it is for those who ask for trial by jury to satisfy the Court that the trial should be by jury rather than without. Rules 8 to 10 apply to all actions, and are supplementary and create no difficulty. This construction of the rules gives full effect to all of them, and is the construction put upon them already by this Court in the cases to which I have referred; and my only reason for reinvestigating the subject is that I think there is still some misunderstanding about it. Rule 4 is sometimes supposed to authorize a trial of an issue by a jury, whereas in truth it is confined to trials of issues without a jury, and other misconceptions have crept in which tend to make the rules obscure.

So far, therefore, as the Appellants base their appeal on rule 6, I am of opinion that they fail.

The next point is to consider rules 5 and 7. In considering rule 5, judges not accustomed to work with juries are apt to underrate their power of dealing with questions involving an examination of maps, plans, and accounts. No doubt when it is necessary to go through a long disputed account item by item it is very difficult, if not impossible, to do so with a jury at the assizes; but to suppose that there is any real difficulty in getting a special jury to see and appreciate the result of accounts, or to apply their minds to and appreciate ordinary maps and plans, is to make a great mistake. Questions of boundary involving an examination of maps are constantly tried satisfactorily and without difficulty by Judges with juries at assizes. It is obvious that in this case no accounts will have to be taken at the trial; and if the learned Judge really thought that this case could not be conveniently tried at the assizes by a Judge with a jury I cannot agree with him.

I pass now to rule 7, which is the rule applicable to this case. As already stated, this rule, when it applies, throws upon the party asking for trial by jury the onus of shewing some good reason why his request should be acceded to. This is obvious

C. A. 1891 JENKINS v. BUSHBY. Lindley, L.J.

from the rule itself, and this is the construction which has been put upon it. The reason given in this case is that a view of the locality by a jury is all-important. I am of opinion that a view may be very important, and that as regards mode of trial the choice really lies, not between a trial by a Judge with or without a jury, but between a trial by a Judge and jury, with a view by the jury, and a trial by some referee who can go to the locality. Of these two modes of trial the former at present appears the best in this case. In my opinion the learned Judge underrated the importance of a view and overrated the difficulty of properly trying the case with a jury. The order appealed from ought to be varied by directing that this action be entered for trial at the *Glamorganshire* Assizes by a Judge and a special jury. The costs of the Plaintiffs' summons and of this appeal should be their costs of the action.

I wish to add that it must not be understood that this mode of trial will be obligatory on the Judge of assize. If he finds it necessary or expedient to order any other mode of trial consistently with the rules he will be quite at liberty to do so.

LOPES, L.J.:—

After the exhaustive judgment of Lord Justice *Lindley*, in which he has fully considered the rules, I only desire to make a general observation or two. It appears to me that rules from 2 to 7 of Order XXXVI. form a code of regulations as to the mode of trial. The effect of them is this. They make a trial by a Judge without a jury the normal mode of trial. They do not take away the right of trial by a jury where it existed before, or give it where it did not previously exist. That appears to me beyond all question to be the general effect of those rules. They do, however, make this change, that where it is desired the trial should be by a Judge with a jury, this mode of trial must be asked for. That is a great and important change, because previously to the *Judicature Acts* all Common Law actions were tried with a jury, and they could not be tried by a Judge without a jury unless the parties consented.

What then is the effect of these rules on the case now before us? It is contended by the Solicitor-General that this case

comes within rule 6, and that the Plaintiffs have an absolute right to a jury. I am clearly of opinion that that is not so. Rule 6 does not apply to this case for the reasons already given by the Lord Justice. Under what rule does it come? It clearly comes under rule 7, and the effect of that rule on the case is, that the party who seeks to have the case taken out of what I call the normal mode of trial, and tried by a jury, must make out a case for that charge.

Do the Applicants in the present case make out such a case? It appears to me that they do. The question here is a question of boundary; and I have no hesitation in saying, from the experience I have had, that in cases of that kind it is frequently most desirable that a view should be had. It often gives assistance to a jury such as nothing else can give. Now, a view cannot be had except by a jury of the county in which the property is situate. That being so, I think that a case is made out by the Plaintiffs for having this action tried in the county of *Glamorgan* by a special jury.

I quite agree with what was said by Lord Justice *Lindley*, that we do not desire to make this order obligatory on the Judge. If at the trial he should be of opinion it would be more desirable to have the case tried by an Official Referee, he will be at liberty so to order. I fully expect, however, that when the trial is entered upon it will be found that there is no difficulty in trying the case with a jury, and that a trial in that way will in all probability be the most satisfactory course, having regard to the interests of both parties. I think, therefore, that this Appeal must be allowed.

KAY, L.J.:—

The real question in this case upon the orders was put by the Solicitor-General in reply, very accurately, thus: Does Order XXXVI., rule 6, except from its operation all causes and matters mentioned in the preceding rules of that order, or only the causes and matters as to which those rules had provided particular modes of trial?

Reading those rules apart from the decided cases, it seems to me that there is very much to be said in favour of the latter of

C. A. 1891 JENKINS v. BUSHBY. Kay, L.J.

these two constructions. But its adoption would certainly result in the formidable difficulty which was pointed out during the argument by Lord Justice *Lindley*. There are very many cases commonly tried in the Chancery Division which are essentially Common Law actions. Such, for instance, are cases of nuisance, trespass actions for obstruction of light and air, and the like. These are not specially provided for in rules 1–5, and on this construction, if any of the parties applied to have them tried by jury, the Court would have no discretion but would be compelled, under rule 6, to direct such trial.

In the *Temple Bar Case* (1) the Court of Appeal adopted the former of these two constructions, holding, that not only the causes and matters, the mode and trial of which was specially provided for, were excepted by the first words of rule 6, but also the causes and matters mentioned at the end of rule 4. That rule provides that the Court or a Judge may direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which, previously to the passing of the principal Act, could, without any consent of parties, have been tried without a jury.

I doubted at first whether the relative "which" did not refer to the issue to be so tried; but, on consideration, I am clear that it refers to the cause or matter mentioned in rule 4; because an issue of fact directed before the *Judicature Act*, 1873, would be tried by a Judge with a jury, and the meaning of the rule seems to me to be that where such an issue is directed in a cause or matter, which cause or matter could have been tried without a jury, then the Court may direct the issue to be tried in like manner.

The *Temple Bar Case* has been followed in many subsequent decisions. It lays down a useful rule, because it gives the Court a discretion as to ordering the trial by jury in the class of cases to which I have referred when commenced in the Chancery Division.

But then it is said that in *Attorney-General* v. *Vyner* (2) it was held that where a plaintiff had brought an action to establish a right of highway in the Chancery Division, although he had

(1) 11 P. D. 6. (2) 38 W. R. 194.

marked his pleadings with a local venue as in this case, so that the trial would have to be at the assizes, and the Judge of the High Court had directed that the trial should be without a jury, the Court of Appeal would not interfere with that exercise of his discretion.

Of course, in a question of discretion, authorities are not of much value. No two cases are exactly alike, and even if they were, the Court cannot be bound by a previous decision, to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion.

Naturally, however, the learned Judge in the Court below felt much pressed by the decision of the Court of Appeal in *Attorney-General* v. *Vyner* (1).

There is, however, this material distinction, that in the present case the question is, what is the true boundary between different properties under which there are valuable mines; and I am fortified in my own opinion as to the importance of trying such a case before a jury who could have a view, by the much greater experience of Lord Justice *Lopes*, who thinks it material if not essential.

I venture to express a hope that the learned Jndge who tries this case will be able so to deal with the costs as to discourage the bringing of an action of this kind in the Court of Chancery, and at the same time fixing a local venue for the trial. This seems to me a revival to some extent of one of the great abuses which the *Judicature Act* and the statutes known as *Rolt's* and *Cairns' Acts*, were intended to remedy, viz., of dragging the defendant from one Court to another, and thereby increasing the delay and cost of the action. I must say that, in my opinion, such a proceeding by the Plaintiff ought to be discouraged.

Solicitors: *Helder & Roberts*, agents for *R. P. Morgan & David, Neath; Meredith, Roberts & Mills*, agents for *Vassall & Co., Bristol; Blunt & Lawford.*

(1) 38 W. R. 194.

W. C. J.

C. A.
1891
KEKEWICH, J.
Jan. 27.
C. A.
Jan. 28.

In re GENERAL SERVICE CO-OPERATIVE STORES.

Winding-up—Staying Actions against Company—Companies Act, 1862, *s.* 85 [*Revised Ed. Statutes, vol. xiv., p.* 222]—*Judicature Act*, 1873, *s.* 24, *sub-s.* 5 [*Revised Ed. Statutes, vol. xvii., p.* 76]—*Companies* (*Winding-up*) *Act*, 1890 (53 *&* 54 *Vict. c.* 63)—*General Order of the* 29*th of November*, 1890.

When a petition has been presented in the Chancery Division to wind up a company, an application to stay an action against the Company in the Queen's Bench Division must still be made in the Division in which the action is pending, the practice in this respect not being altered by the *Companies* (*Winding-up*) *Act*, 1890, and the General Order under it.

Decision of *Kekewich*, J., affirmed.

ON the 20th of January, 1891, a creditor's petition was presented for the winding up of the *General Service Co-operative Stores, Limited*, and was attached to the Court of Mr. Justice *Kekewich*. On the 23rd it was advertised in the *London Gazette*. On the following day, the 24th, another creditor recovered judgment against the company in an action brought in the Queen's Bench Division, and on the same day a writ of *fi. fa.* was issued, under which the sheriff took possession. It was said that at the time he recovered judgment the Plaintiff in the action was aware of the presentation of the winding-up petition. This was an *ex parte* application on behalf of the company to Mr. Justice *Kekewich*, to restrain the sheriff from taking further proceedings under the execution until the hearing of the petition or further order.

The application was heard before Mr. Justice *Kekewich* on the 27th of January, 1891.

Emden, for the company:—

Under the old practice the application in such cases as the present had to be made, by reason of the decision in *In re Artistic Colour Printing Company* (1), to the Division in which the action

(1) 14 Ch. D. 502.

was pending; but that practice has now been altered by sect. 32, sub-sect. 2, of the *Companies* (*Winding-up*) *Act*, 1890, which provides that "In Part IV. of the *Companies Act*, 1862, and in this Act the expression 'the Court,' when used in relation to a company shall, unless the contrary intention appears, mean the Court having jurisdiction under this Act to wind up the company." As sect. 85 of the *Companies Act*, 1862—which gives "the Court" power to restrain further proceedings in any action against a company while a winding-up petition is pending—is included in Part IV. of that Act, sub-sect. 2 of sect. 32 of the Act of 1890 must be read as referring to the expression "the Court" in sect. 85, and an application to stay proceedings must now be made to such Court as has jurisdiction under the Act of 1890 to wind up a company. What Court that is, is indicated by the recent order of the 29th of November, 1890, issued by the Lord Chancellor under the new Act, which says that "the jurisdiction of the High Court under the *Companies* (*Winding-up*) *Act*, 1890, shall until further order be exercised by the Judges of the Chancery Division to whom for the time being Chambers are attached, and such Judges shall on and after . . . and until further order be the Judges of the High Court assigned for the purpose of that jurisdiction pursuant to the *Companies* (*Winding-up*) *Act*, 1890." Accordingly, I submit this application is properly made to your Lordship as one of "the Judges of the Chancery Division."

KEKEWICH, J.:—

I do not think I ought to restrain this execution creditor. Before the Act of 1890 it was, after doubt and hesitation, thoroughly well settled that, if an action were commenced in the Queen's Bench Division, an application to stay the proceedings must be made in that Division; and the only reason alleged why I can accede now to an application to stay such proceedings, the application being made in the Chancery Division instead of in the Division to which the action is attached, is that the case is governed by sect. 32, sub-sect. 2, of the Act of 1890, which says that—"In Part IV. of the *Companies Act*, 1862, and in this Act the expression 'the Court,' when used in relation to a company

C. A. 1891 *In re* General Service Co-operative Stores. Kekewich, J.

shall, unless the contrary intention appears, mean the Court having jurisdiction under this Act to wind up the company." It is argued that I am to read sect. 85 of the *Companies Act*, 1862, as if, instead of the words "the Court," the words were "the Chancery Division of the High Court." It appears to me that the Act of 1890 speaks of the Court having jurisdiction to wind up the company with reference to sect. 1, which enumerates the different Courts which have jurisdiction, namely, "the High Court, the Chancery Courts of the Counties Palatine of *Lancaster* and *Durham*, the County Courts, and the Stannaries Court." In some respects that enumeration is subject to the nomination of the Lord Chancellor, who, by sect. 2, is authorized to direct, by General Order, to what Judge or Judges of the Chancery Division the exercise of the winding-up jurisdiction of the High Court under that Act shall be assigned; and the Lord Chancellor has, under the power given to him by that section, said that the jurisdiction under that Act shall, until further order, be exercised by the Judges of the Chancery Division, and that until further order such Judges shall be the Judges of the High Court assigned for the purpose of that jurisdiction, pursuant to the Act. I do not think the Lord Chancellor could have properly said under that section, and certainly he has not said, that the High Court shall not have jurisdiction, but only that the jurisdiction vested in the High Court shall be exercised for the present by the Judges of the Chancery Division. That, in my opinion, is a different thing from saying that in section 85 the words "Chancery Division" are to be read instead of "the Court"—that is, the High Court. No doubt the meaning of sect. 32, sub-sect. 2, of the Act of 1890, is not quite so clear as one could wish; but I must say this, that if I were to accede to the interpretation Mr. *Emden* has asked me to place upon the Act of 1890, that would be to revive the abuse which, according to the decision in *In re Artistic Colour Printing Company* (1), it was expressly intended by the *Judicature Acts* to remove—namely, coming with an application of this kind to a different Court from that in which the proceedings are pending.

In my opinion, I ought to refuse to restrain the judgment

(1) 14 Ch. D. 502.

creditor on the ground that this application is made to the wrong Court—or, rather, to the wrong Judge.

G. I. F. C.

The company appealed from that decision. The appeal was heard on the 28th of January, 1891.

Emden, for the company, repeated the argument in the Court below.

LINDLEY, L.J.:—

The *Companies* (*Winding-up*) *Act,* 1890, sect. 1, sub-s. 1, provides that the High Court shall have jurisdiction to wind up companies, but says nothing about the Division of the High Court which is to exercise that jurisdiction. By sect. 2 the jurisdiction of the High Court under this Act shall, as the Lord Chancellor shall from time to time direct, be exercised either by such Judges of the Chancery Division as the Lord Chancellor may assign to exercise that jurisdiction, or by the Judge who for the time being exercises the bankruptcy jurisdiction of the High Court. The general order of the 29th of November, 1890, provides that the jurisdiction of the High Court under the Act of 1890 shall be exercised by the Judges of the Chancery Division to whom for the time being Chambers are attached. This makes the Chancery Division the High Court for the purpose of exercising the jurisdiction conferred by the Act of 1890. But to stay actions is to exercise a jurisdiction conferred not by the Act of 1890, but by the older Act of 1862; and since the Judicature Acts the proper branch of the High Court to apply to for the purpose of staying an action is the Division in which such action is pending. It was never intended by the Act of 1890, or the order under it, to revive the old practice of the Court of Chancery staying proceedings in other Courts.

LOPES, L.J.:—

I have nothing to add. The case appears to me perfectly clear.

C. A. 1891 *In re* General Service Co-operative Stores.

KAY, L.J :—

Under the *Companies Act*, 1862, sect. 85, the Court of Chancery, after a winding-up petition had been presented, had jurisdiction to restrain actions in other Courts against the company. By the *Judicature Act*, 1873, sect. 24, sub-sect. 5, and the *Judicature Act*, 1875, sect. 11, sub-sect. 1, it was provided that applications to stay proceedings in any cause or matter must be made in the Division to which the cause or matter is attached; and it was therefore held in *In re Artistic Colour Printing Company* (1), that applications to stay proceedings in an action against a company, when a petition has been presented for winding up the company, should be made in that branch of the High Court in which the action is pending. Then comes the Act of 1890, which says that the High Court is to have jurisdiction, but does not say which Division of the High Court is to exercise it. The General Order of November, 1890, says that the Chancery Division shall exercise the jurisdiction of the Act of 1890; but this power of staying actions is not a jurisdiction under that Act; and, in my opinion the rule as laid down by *In re Artistic Colour Printing Company* remains unaltered.

Solicitors: *Sweetland & Greenhill.*

(1) 14 Ch. D. 502.

H. C. J.

ELVE *v.* BOYTON.

C. A. 1891 Jan. 29.

[1890 E. 227.]

Trustee—Investment—Will—Construction—Company Incorporated by Act of Parliament—Charter granted in pursuance of a Statute.

By an Act of Parliament the Crown was empowered to grant a charter of incorporation to a marine insurance company, with certain special privileges and limitations. In pursuance of this Act the Crown granted a charter to the *London Assurance*. By a subsequent Act the capital stocks of the *London Assurance* and another corporation were amalgamated, and the name and seal of the *London Assurance* were to be used for both corporations, and the *London Assurance* was to exercise the powers of both corporations.

A trustee of a will, who had power to invest in shares of "any company incorporated by Act of Parliament," invested in shares of the *London Assurance*:—

Held, that the *London Assurance* was a company incorporated by Act of Parliament within the meaning of the investment clause.

Semble, that if the *London Assurance* had not been originally within the terms of the investment clause, it would not have come within the terms by virtue of the subsequent Act amalgamating its stock with that of another corporation and enlarging its powers.

THIS was an appeal from a decision of Mr. Justice *North*.

James Ayres, the testator in this action, died in 1856, having by his will made on the 7th of April, 1854, devised and bequeathed his real estate and the residue of his personal estate to his trustees and executors in trust to sell, and after payment of debts, funeral, testamentary, and other expenses, to invest in specified securities, including "the stocks, shares, or securities of any company incorporated by Act of Parliament, and paying a dividend," and pay the income to his wife for life, and after her death in trust to set apart a portion of the trust funds for his daughter, *Charlotte Plowman Ayres*, upon trust thereinafter declared, and to set apart the remainder on trust for his daughter *Jane Ann Elve*; and the testator declared that the share of the trust fund to which each of his daughters should be entitled should be held by his trustees upon trust to convert the same into money and invest the proceeds in the names of his trustees

C. A. 1891 ELVE v. BOYTON.

in the investments provided by his will upon the trusts therein mentioned.

The testator's widow died in October, 1876. In 1877, *Thomas H. G. Snowden*, who was then the sole surviving executor and trustee of the will, invested £2719 7*s.* 6*d.*, part of the trust fund, in forty shares of the *London Assurance*. He appropriated twenty-seven and a half of the shares to the share of *Charlotte Plowman Ayres*.

Thomas H. G. Snowden died in November, 1887. The Defendants were his executors. In 1888 they sold the forty shares in the *London Assurance* for £2091 18*s.*, suffering a loss of £627 8*s.* 6*d.* The loss on the shares appropriated to the trust for *Charlotte Plowman Ayres* amounted to £442 2*s.* 6*d.*

Charlotte Plowman Ayres died in January, 1890, and her trust fund became vested in the Plaintiff, who was her executrix.

The Plaintiff claimed payment of £442 2*s.* 6*d.* and interest, on the ground that the investment in the *London Assurance* shares was unauthorized, the *London Assurance* not being a company incorporated by Act of Parliament.

By a public general Act of Parliament, passed in the year 1719 (6 Geo. 1, c. 18), His Majesty was empowered to grant two several charters incorporating two separate bodies for the assurance of ships, goods, and merchandises at sea or going to sea, and for lending money upon bottomry, the charters to be subject to a redemption or power of revocation in the Act provided. It was provided by sect. 2 that each corporation should pay a sum of £300,000 into the exchequer for discharging the debts of the Civil List; and by sect. 3, that on non-payment for thirty days of any part of the sum of £300,000, within thirty days of the time limited for the purpose, His Majesty, his heirs or successors, might revoke the charter of the defaulting corporation and determine the corporation.

By sect. 12 it was provided that during the existence of the corporations no other society was to be allowed to assure ships or lend money on bottomry.

Sect. 15 provided that, upon three years' public notice in the *London Gazette*, and affixed upon the *Royal Exchange* in *London*, by authority of Parliament, within thirty-one years,

and upon payment of the £300,000, which should have been advanced by either corporation, such corporation might be determined.

Sect. 16 provided that if at any time after the expiration of thirty-one years His Majesty, his heirs or successors, should judge the further continuance of the two corporations to be hurtful or inconvenient to the public, His Majesty, his heirs or successors, might revoke and make void the corporations.

Sect. 17 provided that in case the corporations should be redeemed or revoked, no other corporation with like powers, privileges, and advantages should be grantable.

In pursuance of the above Act, by a charter granted by the King on the 22nd of June, 1720, a corporation was created by the name of the "*London Assurance*," for assurance of ships, goods, and merchandises at sea or going to sea, and for lending money on bottomry, with a constitution in accordance with the provisions of the Act.

By a prerogative charter dated the 29th of April, 1721, His Majesty incorporated the then present members of the *London Assurance*, and all persons who should be thereafter admitted members, as a distinct corporation for life and fire assurance, under the name of the "*London Assurance of Houses and Goods from Fire*," with power to raise a distinct capital. It was provided by the charter that the governor, sub-governor, deputy-governor, and directors of the *London Assurance* for the time being, should be the governor, sub-governor, deputy-governor, and directors of the new corporation. It was provided by the latter charter that the new corporation should pay a part of the £300,000 which the *London Assurance* was under obligation to pay into the exchequer. A part of such sum was paid, and the rest was released by Act of Parliament (7 Geo. 1, c. 27).

The two corporations were recognised by various Acts of Parliament, and by 11 Geo. 4, c. lxxiv. the two corporations were given powers of investment and, for the purposes of the same Act only, made one consolidated corporation under the name of the "*London Assurance Loan Company*."

In the year 1853, the *London Assurance Consolidation Act*, 1853, a private Act (16 Vict. c. i.), was passed. It recited the

C. A. 1891 ELVE v. BOYTON.

history of the three corporations stated above, and provided as follows:—

Sect. 1. "The capital stocks of the respective chartered corporations of the *London Assurance* and the *London Assurance of Houses and Goods from Fire* shall be and are hereby consolidated, and shall form one consolidated stock."

Sect. 2. "The corporate name and seal of the corporation called the '*London Assurance*' shall or may henceforth be used for all the purposes for which the corporate name and seal of the corporation called the '*London Assurance of Houses and Goods from Fire*,' and the name and seal of the '*London Assurance Loan Company*' can or may or (but for this Act) could or might be used."

Sect. 3. "The members of both such chartered corporations shall have the same relative shares and interests in the said consolidated stock and the profits thereof as they now have in the capital or stock of both or either of such corporations and the profits thereof, and the shares in such consolidated stock shall be subject to the same provisions and regulations, and shall have the same properties, rights, and incidents in every respect as the shares in the capital or stock of the *London Assurance* now are subject to and have under or by virtue of the first-recited charter and Act of Parliament: or any bye-laws made in accordance therewith."

Sect. 4 provided that contracts and obligations entered into by either of the said chartered corporations or by the *London Assurance Loan Company* should be valid and effectual against the *London Assurance* only. Sect. 5 provided that contracts and securities made in favour of either of the three corporations should be valid and effectual in favour of the *London Assurance* only. Sect. 6 provided that actions and suits by or against any of the three corporations should not abate but should continue in favour of or against the *London Assurance*.

Sect. 7 provided that the *London Assurance* might "for the benefit of the said consolidated stock" exercise all the powers of the three corporations.

Sect. 8 was as follows: "It shall be lawful for the members of the *London Assurance of Houses and Goods from Fire* to exercise

and enjoy jointly with the members of the *London Assurance* all rights, powers, and privileges which are now exercised and enjoyed by the last-named members under or by virtue of the firstly-recited charter and Act of Parliament, as fully and effectually to all intents and purposes as if the members of the *London Assurance of Houses and Goods from Fire* had been members of the *London Assurance.*"

Sect. 10 was as follows: "In case of the *London Assurance* ceasing to exist, the corporation called the '*London Assurance of Houses and Goods from Fire,*' and the members thereof, shall, for the purposes mentioned in its said charter, and so far as the same shall be applicable thereto, but not further or otherwise, thenceforth have, exercise, and enjoy all and every the powers, privileges, and indemnities by the said recited charters and Acts of Parliament or this Act given to or conferred upon the said chartered corporations, or either of them, or the members thereof respectively, or the *London Assurance Loan Company.*"

Sect. 11 provided that the *London Assurance* might "by means of and for the benefit of the said consolidated stock," purchase businesses and make investments in manner therein stated.

At the trial of the action before Mr. Justice *North*, on the 26th of November, 1890, his Lordship inclined to the opinion that the investment was within the terms of the investment clause, but held that it was not necessary to give any judicial decision on the point, because he considered that there was sufficient in the statements contained in the Acts of Parliament from time to time as to the position of the company to justify the trustee in making the investment, and that there was no such breach of duty on his part as to make him personally liable. From this judgment the Plaintiff appealed.

Cozens-Hardy, Q.C., and *F. C. Gore*, for the Appellant:—

The liability of a trustee must be governed by the terms of the investment clause. If the investment is not within the power, he is liable for any loss, however innocent may have been his intention, and however natural may have been his mistake: *In re Whiteley* (1); *Speight* v. *Gaunt* (2). The case,

(1) 33 Ch. D. 347. (2) 9 App. Cas. 1.

C. A. 1891 ELVE v. BOYTON.

therefore, depends solely upon the construction to be put upon the words "incorporated by Act of Parliament." There is no question that the *London Assurance* was incorporated by royal charter, which has full power to grant charters without the consent of Parliament. The only reason why the statute was required was to give certain privileges and to impose certain limitations on the company, and to enable the Crown to revoke the charter; but all powers which make the essence of a corporation, such as having a corporate seal, and suing and being sued, were derived from the Crown. If the words of the clause were, "by virtue of an Act of Parliament," it might have been different: but the clause must be construed strictly. Joint stock companies registered under the *Companies Acts*, 1862 and 1867, could not properly be described as incorporated by Act of Parliament, although their incorporation is under the authority of those Acts.

It is contended by the Respondents that, if the *London Assurance* was not originally incorporated by Act of Parliament, the effect of subsequent legislation, particularly of the Act of 1853 (16 Vict. c. i.), has been to create a new statutory corporation. But that is not so. The two corporations, the *London Assurance* and the *London Assurance of Houses and Goods from Fire* were not amalgamated into one corporation, although their capital stocks were amalgamated and the members of one became the members of the other.

Everitt, Q.C., and *R. F. Norton*, for the Defendant, were not called on.

LINDLEY, L.J.:—

In this case we have to construe a clause relating to the investment of trust funds which is contained in a will dated the 7th of April, 1854. The trustees under that will were empowered to invest the trust moneys upon the security, amongst other things, of "the stocks, shares, or securities of any company incorporated by Act of Parliament and paying a dividend," and from time to time to vary the investments. I need not go through the devolution of the title; nothing turns on that. What the trustees did

was this. They invested money in the purchase of stock of a company called the *London Assurance*, and the question is, whether that company was a company incorporated by Act of Parliament.

It is conceded on all sides that the trustees acted with perfect *bona fides* in the matter; but I apprehend Mr. *Cozens-Hardy* is quite right when he says that that is immaterial, if they have unfortunately invested the money upon securities not authorized. The question of *bona fides* arises only when they have invested in authorized securities. Therefore, we must face the question whether the stock of this particular corporation falls within the description of "the stock, shares, or securities of a company incorporated by Act of Parliament" within the true meaning of this clause.

Now, the history of this corporation is this. It was created in 1720 by a charter from the Crown, which itself was granted pursuant to the provisions of an Act of Parliament of 6 Geo. 1, c. 18. Now, consider for a moment what the Crown could do, and what it could not do at that time. The Crown could by its prerogative incorporate any number of persons who assented to be incorporated, and it was the prerogative of the Crown to give them power to sue and be sued by their corporate name, to use a common seal, to make byelaws, and so on. But it was not in the power of the Crown to give those persons any rights in the way of monopolies. It was not in the power of the Crown so to incorporate those persons as to make them liable to any extent to the debts of the corporation. What does this Act of Parliament of the 6 Geo. 1 do? It empowers the Crown to grant charters of a particular kind—to grant charters which the Crown could not grant apart from the provisions of this Act of Parliament. It empowers the Crown to grant charters of incorporation to persons who should be liable to calls, amongst other things, which the Crown could not do. It enacts that these corporations, when created, shall pay certain moneys to the Civil List; it gives them a monopoly in matters of assurance and bottomry, which the corporations could not have had without the Act of Parliament—most important rights and privileges; and it was pursuant to the provisions of that Act that

C. A. 1891 ELVE v. BOYTON. Lindley, L J.

the Crown granted a charter, and incorporated this *London Assurance.*

Now let us take the case and stop there, and ask ourselves whether such a corporation so created is not, in the language of this will, incorporated by Act of Parliament? It is said, no; it is incorporated by charter. The answer is, it would have been impossible, without the Act of Parliament, to create such a corporation by that charter or any other charter. The real truth is, that, if you look at it very closely, the corporation owed its birth and creation to the joint effect of the charter and of the Act of Parliament, and you can no more neglect the Act of Parliament than you can neglect the charter. It appears to us that, upon any reasonable construction of this clause, this first corporation was a corporation incorporated by Act of Parliament within the true meaning of that clause. I stop there. That is quite sufficient for the purpose. There are other Acts of Parliament which have reconstituted the corporation. Especially there is the Act which Mr. *Cozens-Hardy* drew our attention to carefully and properly, the 16 Vict. c. i. I am not prepared to base my decision upon the provisions of that Act of Parliament. It appears to me that it is consistent with those provisions to hold that the effect of that Act of Parliament was not to create a new corporation, but to extend the powers of the old corporation. If it is consistent with that, I do not think it would be right to imply a new and fresh incorporation of the larger body. I prefer to base my judgment upon the ground which I have mentioned, that, looking to the fact that this corporation was created by a charter which would have been invalid without the Act of Parliament, this particular corporation was incorporated by Act of Parliament within the true meaning of the investment clause. The appeal must be dismissed.

LOPES, L.J.:—

I entirely agree with everything that has been said by my brother *Lindley*, and I feel that if I were to attempt to add anything I should be only repeating what he has already so well said.

KAY, L.J.:—

I agree, and have nothing to add.

C. A. 1891 ELVE v. BOYTON.

Solicitors for Plaintiff: *Prince, Ayres, & Austen*, agents for *Prince & Ayres, Brighton.*

Solicitors for Defendants: *Speechly, Mumford, Landon, & Rodgers*, agents for *Wotton, Ramsgate.*

M. W.

COOKE *v.* SMITH.

C. A. 1891 KEKEWICH, J. *Jan.* 20. C. A. *Feb.* 9, 10.

[1889 C. 67.]

Practice—Discovery of Documents—Security for Costs—Application for further Deposit—Time for Application—Rules of Supreme Court, 1883, *Order* XXXI., *r.* 26.

The power of the Court under Order XXXI., rule 26, to order payment into Court of an additional sum by way of security for costs of discovery in excess of the prescribed sum of £5, is not limited to the time when the order for discovery is made, but may be exercised at any time when the circumstances shew that further security is required.

When discovery of documents is made, it is not enough to make them up in bundles and number the bundles, but the documents in the bundles must be described, and each document must be marked or numbered specially, so that any party requiring a particular document may call for it.

ADJOURNED SUMMONS.

The Plaintiffs, by their statement of claim, alleged that by a deed of the 29th of December, 1876, a business, stock-in-trade, effects, and property, in which the Plaintiffs and the Defendant, *Joseph Cooke*, had previously been interested as co-partners, were assigned to the Defendants *Smith* and *Storey*, as trustees, upon trust to carry on the business, and out of the profits pay the debts of the late firm rateably; that the business was carried on by the trustees under the superintendence of *Joseph Cooke*, very large profits were made, and the balance due to the creditors, other than the Defendants, the *Barrow Hæmatite Steel Company*, in respect of their claims, had been discharged. It was further alleged that the trustees had made excessive payments to the *Barrow Company* in the course of carrying on the business, and

C. A. 1891 COOKE v. SMITH.

had subsequently sold the property comprised in the deed to the company at a gross undervalue. The Plaintiffs claimed an account of the receipts of *Smith* and *Storey*, as such trustees, with disallowance of the alleged excessive payments to the *Barrow Company*; that the sale might be declared a breach of trust and void, and if necessary set aside, and that *Smith* and *Storey* might make good the loss occasioned thereby; and for the appointment of a receiver, and for other relief.

On the 25th of March, 1890, the case came before Mr. Justice *Kekewich* on the preliminary question of law whether, on the true construction of the creditors' deed, the Plaintiffs had any title to maintain the action; and his Lordship decided that there was no resulting trust for the Plaintiffs, and that they had no title to maintain the action. But the Court of Appeal reversed this judgment, and held that there was a resulting trust for the Plaintiffs after payment of the creditors in full (1). The facts are fully stated in the previous report. The Defendants, other than *Cooke*, appealed to the House of Lords from this decision.

On the 19th of August, 1890, the usual order was made, on the application of the Plaintiffs, that the Defendants, other than *Joseph Cooke*, should, within six weeks after service of the order, make an affidavit or affidavits as to documents. The Plaintiffs paid into Court, to "Security for Costs Account," the sum of £5, as required by Order XXXI., rule 26 (2), and duly served with the order a copy of the receipt for payment of such sum.

On the 1st of October, 1890, the Defendants *Smith* and the *Barrow Company* took out this summons, asking that the

(1) 45 Ch. D. 38.

(2) Order XXXI., rule 26, is as follows: "Any party seeking discovery by interrogatories shall, before delivery of interrogatories, pay into Court to a separate account in the action, to be called 'Security for Costs Account,' to abide further order, the sum of £5, and, if the number of folios exceeds five, the further sum of 10s. for every additional folio. Any party seeking discovery otherwise than by interrogatories shall, before making application for discovery, pay into Court, to a like account, to abide further order, the sum of £5, and may be ordered further to pay into Court as aforesaid such additional sum as the Court or a Judge shall direct. The party seeking discovery shall, with his interrogatories or order for discovery, serve a copy of the receipt for the said payment into Court, and the time for answering or making discovery shall in all cases commence from the date of such service. . . ."

Plaintiffs might be ordered to increase the amount paid by them into Court to the sum of £200, and that the applicants might have three months' further time for filing their affidavits of documents from the time of payment of such increased amount.

There was evidence, which was not substantially disputed, that the books and documents in the possession of the applicants relating to the business in question were exceedingly voluminous and many thousands in number, and it was stated that a considerable time would necessarily be occupied in examining the documents with a view of ascertaining which were privileged and which ought to be produced, and that the cost of furnishing a proper affidavit or affidavits, including necessary accountants' fees for investigation of books and documents, would amount to not less than £200.

On the other hand, an affidavit was sworn by one of the Plaintiffs, in which he said that the expense of conducting the action had been so great, that the means of the Plaintiffs were exhausted, and that if an order was made for a large sum to be deposited they would not be able to find it.

The summons was heard before Mr. Justice *Kekewich* on the 20th of January, 1891.

Renshaw, Q.C., and *Farwell*, in support of the summons.

Mansfield, for the Plaintiffs, objected:—

The application is too late, and the Court has no jurisdiction to entertain it, or to interfere with the order of the 19th of August, 1890, which is binding on all parties. The proper time for making any such application was when that order was made. Order XXXI., rule 26, provides that any party seeking discovery otherwise than by interrogatories shall pay £5 into Court, and may be ordered, further, to pay into Court such additional sum as the Court shall direct; and he is to serve with the order for discovery the receipt for "the said payment into Court." Those words must include the additional sum as well as the original £5; and it necessarily follows that the direction for payment of the additional sum must be given before or when the order for discovery is made.

C. A.
1891
COOKE
v.
SMITH.

Renshaw, Q.C., and *Farwell*:—

There is nothing in the terms of Order XXXI., rule 26, to restrict the general provision that the party seeking discovery "may be ordered further to pay into Court such additional sum" as the Court shall direct. He must pay the £5 before he takes out his summons, but he may at any time be ordered to pay an additional sum. This is clear from Order LXV., rule 6, which provides that in any cause or matter in which security for costs is required, the security shall be of such amount, "and be given at such times," and in such manner and form, as the Court shall direct. It is the regular practice of the Court to order further security for costs from time to time, as occasion requires.

[KEKEWICH, J., referred to *Republic of Costa Rica* v. *Erlanger* (1).]

The deposit on application for discovery is to be paid to "Security for Costs Account," and is intended as a security for the general costs of the action. It would be most inconvenient if the application for further security had to be made on the occasion of the order for discovery being applied for. If the defendant made affidavit that the documents were voluminous, the plaintiff might contradict him and cross-examine. The defendant would be put to the trouble and expense (an expense which he could apparently never recover) of going through all the documents, when perhaps after all the application for discovery might be refused. In the present case the deposit of £5 is altogether inadequate, and we ask that a substantial sum may be paid into Court.

L. Sanderson, for the Defendant *Storey*.

Mansfield, in reply:—

The Defendants are trustees for the Plaintiffs, who, therefore, as *cestuis que trust*, have an absolute right to production and inspection of these documents.

(1) 3 Ch. D. 62.

KEKEWICH, J.:—

In considering this case I put aside the general rule as to security for costs contained in Order LXV., rule 6. I do not say that that rule is not *ad rem*, but it does not really assist me in construing Order XXXI., rule 26. The real question as regards that rule is whether the power of the Court to order a further payment in excess of the £5, which is an essential to any order for discovery otherwise than by interrogatories, is limited to the time when the order for discovery is made. Now what is the practice established by this rule? I of course take it for granted that it is advantageous for the administration of justice that discovery shall not be ordered without payment into Court of an adequate sum—whatever that may be—a sum which is in no case to be less than £5, and may be such further sum as the Court, having regard to all the circumstances of the case, shall think right to direct.

Now as a matter of convenience I have no doubt that it is desirable that the Court should not be bound to consider what further sum if any should be paid, or to finally decide that question, at the time when the application for discovery is made. I say this not so much from my experience as a Judge as from my still larger experience as a junior counsel; for although I have very seldom, if ever, seen my way to advising a defendant to restrict his discovery, I have over and over again—and I suppose it is the general experience—been obliged to advise him to extend his discovery far beyond what he or anybody else anticipated when the order for discovery was made against him. It is impossible that any man, whether in or out of business, should be able, when litigation is commenced against him and an order for discovery made, to say at once, "I have two or three bundles of documents, twenty or thirty letters, such and such books," and so forth. When the order has been made he is bound to go into the matter with great care, remembering that he has to swear what documents he has or has ever had, and to account for those which he has not; and when he does that his eyes are opened, and, as he proceeds, more and more opened to the fact that a large number of documents, which it never occurred to him or any one to suppose would be material, are in fact

C. A.
1891
COOKE
v.
SMITH.
Kekewich, J.

material to the discovery required. But if that were to be gone into when the order for discovery was made two results would follow. Considerable costs would be incurred in the investigation of the matter, and, what is perhaps more important, the delay would be very great. The defendant would be obliged to inquire into the documents and the plaintiff to see them at a great disadvantage, and a period of two, three, or even six months might be occupied by the defendant in ascertaining what documents it was proper to produce. Therefore, on the ground of convenience, I have no doubt what the practice ought to be; but as regards the words of the order there is more doubt. By Order XXXI., rule 26, the party seeking discovery otherwise than by interrogatories is before making application for discovery to pay into Court the sum of £5, "and may be ordered" further to pay into Court such additional sum as the Court shall direct, and when he serves the order he is to serve with it "a copy of the receipt for the said payment into Court." Of course it is impossible that he should serve with the order for discovery a receipt for an unascertained sum which he has not been ordered to pay, and yet I think there can be no doubt that the words, "the said payment into Court," cover not only the £5, but such further payment, if actually made; that is, that if there has been an order for payment of an additional sum the receipt must extend to such additional sum. Does that restrict the power of the Court, or prevent the Court from thereafter making such an order? I see no words of restriction; and apart from the further general order, which I have advisedly set aside, I have no doubt that when it is said in any order that the Court may direct a sum to be paid, and there are no words indicating that it must be paid within a particular time, the Court may direct the payment whenever circumstances require it. That is the general power of the Court. Whenever it is established that something is required to be done by way of security, the Court may at any time make it a condition that what is so required shall be done by the party having the carriage of the order. On all these grounds I see no reason to hesitate in saying that the Court may, notwithstanding an order for discovery has been made, direct a further sum to be paid into Court as a security.

In this case it has not been contested, either now or before me in Chambers, that the documents and accounts are not only voluminous but minute. The Plaintiffs' case is that by the receipts in respect of the business under the deed of December, 1876, such receipts being set off against payments, the Defendants have paid the creditors in full and are bound to hand over the property to the Plaintiffs. The matter has been going on for many years and the details are endless. That being so, it is ridiculous to suppose that £5 is an adequate sum as security for costs of discovery. Then what is an adequate sum? I do not think that it was intended that the sum to be deposited should fully cover the costs of discovery. The sum of £5 might cover the costs in small cases, but it could not be sufficient if the case were of any magnitude. It is not suggested that in every case where the defendant thinks it likely that he will incur costs to the extent of double that sum the Court will necessarily direct a further sum of £5 to be paid. The payment is rather intended as a guarantee of *bona fides* and as something which might be useful as security for costs. Another consideration is this, that the Plaintiffs are alleged to be persons to whom money is of considerable importance, and to order such a sum as £200 to be paid might really be to defeat their claim. I do not think the rule of Court was intended to be prohibitive. At the same time I think that a substantial sum ought to be paid, and I will hear Mr. *Renshaw* on the question of amount.

My attention was called to the peculiar character of the action, which is grounded on the allegation that the Defendants are trustees for the Plaintiffs. The Plaintiffs say that the Defendants, having paid the creditors in full, thereupon became trustees for the Plaintiffs, and thereafter the documents were documents which the Defendants as trustees were bound to produce to their *cestuis que trust*. The argument is ingenious and deserves mention; but I think the answer to it is that the Plaintiffs do not come here merely in the character of *cestuis que trust*, but to assert their title to property which is vested in the Defendants; they seek discovery as between Plaintiffs and Defendants, and have obtained the usual order which is made between litigants. I think, therefore, that any right of the kind asserted is not available in such a case as this.

C. A. 1891 COOKE v. SMITH.

After some discussion his Lordship ordered further security to be given to the amount of £100, but intimated a doubt whether the Plaintiffs were not seeking more extensive discovery than was actually necessary, and gave them liberty to apply that the amount of the security might be reduced in the event of their limiting the discovery sought.

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The Plaintiffs appealed from this decision. The appeal was heard on the 9th of February, 1891.

Henn Collins, Q.C., and *Mansfield*, for the Appellants:—

The proper time for increasing the deposit is when the £5 is paid in and before the order for discovery is made. The Court has no jurisdiction to make any subsequent order under the rule.

But if the Court has jurisdiction, this is not a case in which it ought to be made. The rule was framed in order to insure *bona fides* on the part of the person applying for discovery. It ought not to be used so as to obstruct or embarrass him in asserting his right to discovery. The Plaintiffs in this case cannot go on with their action unless they obtain discovery; and they are so impoverished by the litigation that they say they cannot provide the sum ordered. It would be introducing a new principle into the law if a plaintiff is to be compelled to deposit security for costs before he can prosecute his action. Discovery is the right of every suitor however poor. The burden upon the Defendants is not so great as they pretend. They have only to put the documents in bundles, and number the bundles.

[LINDLEY, L.J.:—If you limit the order for discovery to such documents as are material to your claim to set aside the sale, the number of documents will be considerably diminished, and the Defendants will not have much to complain of.]

That would be sufficient for us.

Renshaw, Q.C., and *Farwell*, Q.C., for the Defendants, *Smith* and the *Barrow Company*:—

In order to impeach the validity of the sale the Plaintiffs will have to go into the dealings and transactions of the trustees in the business. Even if the discovery were limited to the question

of the validity of the sale, as suggested, it would necessitate the examination of all the trustees' accounts since 1876. The discovery would even then be extremely burdensome. The Court has full jurisdiction to make the order, and the amount of the deposit ordered is not excessive. There is no sufficient evidence that the Plaintiffs cannot provide it.

L. Sanderson, for the Defendant *Storey*.

Henn Collins, in reply.

LINDLEY, L.J.:—

This is an appeal from an order made by Mr. Justice *Kekewich* of a somewhat unusual kind, after the common order for an affidavit of documents had been made in a suit which was instituted in order to obtain an account of the trusts of a creditors' deed, and to set aside a sale made by the trustees of that deed to the *Barrow Hæmatite Steel Company*. That order was made in the Vacation, on the 19th of August, 1890. I do not suppose anybody's attention was called to it, and probably the order went almost as a matter of course. On the 1st of October, 1890, the Defendants finding that order was becoming a very serious matter, took out a summons in order to obtain a further security, or a further deposit in Court, which was this: "That the Plaintiffs may be ordered to increase the amount paid by them into Court to 'Security for Costs Account' on their application for discovery, an order for which was made on the 19th of August last, in the sum of £200, and that the Defendants may have three months further time for filing the affidavit of documents directed to be filed by the said order from the time of the payment of such increased amount; and that the costs may be costs in the action." That summons was taken out under the provisions of Order XXXI., rule 26, which runs thus: "Any party seeking discovery by interrogatories shall before delivery of interrogatories, pay into Court to a separate account in the action, to be called 'Security for Costs Account,' to abide further order, the sum of £5." Then it proceeds: "Any party seeking discovery otherwise than by interrogatories shall, before making application for discovery, pay

C. A. 1891 COOKE v. SMITH. Lindley, L.J.

into Court, to a like account, to abide further order, the sum of £5, and may be ordered further to pay into Court as aforesaid such additional sum as the Court or a Judge shall direct." Then the order at the end says: "The party from whom discovery is sought shall not be required to answer or make discovery unless and until the said payment has been made."

The Defendants applied under that order for an extra deposit. Mr. Justice *Kekewich*, on looking into the matter, came to the conclusion that there was a proper case for requiring a further deposit; he considered that £200, which was asked for by the Defendants, was too much, and he halved the amount, and then he made the order which is now appealed from. He ordered the Plaintiffs to pay into Court the sum of £100; then he enlarged the time for filing the affidavit of documents; and then the order runs on in this way: "And the Plaintiffs are to be at liberty to apply to reduce the amount of the security for costs." And he made the costs costs in the action. From that the appeal is brought. Mr. *Mansfield* based his appeal upon the ground, amongst others, that it was not competent for the Court to make such an order as this except when the order for discovery was made. He said that any security or extra security for costs ought to have been asked for on the occasion when the order was made on the 19th of August, 1890, and he contended that there was no power and no jurisdiction on the part of the Court to make an order at any subsequent time. That appears to me to be quite an untenable contention. There are no words in the rule which I have read which limit the time when a further payment into Court may be ordered, and one's own experience in these matters is quite enough to make it plain that the necessity of applying for further security may not be obvious at the first moment. It is not until the solicitor for the person making discovery comes to look at the materials he has to deal with that he finds the necessity for asking for such additional security. It appears to me, therefore, that we should be putting upon this rule an interpretation far too rigid and wrong if we were to say that nobody could apply for a further deposit unless he did so at the time when the usual order for the affidavit of documents was made.

C. A.
1891
COOKE
v.
SMITH.
Lindley, L.J.

Then it is put in a different way, and perhaps a more formidable way. It is said that the order was never intended to be made available against a poor man, so as to compel him to give security for the costs of an action. We all know that a poor man, although he may be compelled to give security for the costs of an appeal, cannot be compelled to give security for the costs of an action. If he is very poor he can sue in *formâ pauperis*; and I agree with Mr. *Collins* that it was not the intention of these rules to enable the Defendants to stop an action by a poor man by compelling him to give security for the costs of the action. What was the object? The object was this. It was seen by those who had experience in this matter that the rules as to the production of documents and as to discovery were capable of being very oppressively used, there being under the old practice cases of the greatest possible cruelty, and it was felt that in order to prevent such a harsh and oppressive use of the powers of discovery and of requiring affidavits of documents a check should be put upon it by requiring a deposit of money as a security, not simply as a pledge of *bona fides*, but as something more than that; and, consequently, these orders have been framed, and whatever money is deposited is carried to the account called "Security for Costs Account."

Now in this case let us consider whether Mr. Justice *Kekewich* has taken an erroneous view in requiring a further deposit. I do not know, of course, anything about the merits of this case, except so far as one can know them from the pleadings; but in point of fact here are gentlemen now seeking to rake up transactions from as early a date as 1876. They may be perfectly justified in doing it, for anything I know; but when we look at the nature of the relief sought here, and see how closely one portion of it is interwoven with and dependent upon another, I think it is impossible so to frame an order for an affidavit of documents as to limit the common form, which I think can hardly be departed from without doing injustice to one side or the other. They come therefore and ask for an affidavit of documents of a very serious kind. I think I saw that the Defendants' solicitor talks of 50,000 documents which he must go through in order to see what he may put in his affidavit of documents. That is a

C. A. 1891 COOKE v. SMITH. Lindley, L.J.

very serious matter indeed. I think, under those circumstances, having regard to the nature of this case, that Mr. Justice *Kekewich* was justified in saying that the sum of £100 ought to be deposited in Court as further security for the costs. I am not prepared to dissent from him at all. During the argument we did suggest that the order might be varied by limiting the questions as to which the documents are to relate; but upon reflection we find it would be very difficult, and I do not think we ought to do so. Under those circumstances, the appeal will be dismissed, and dismissed with costs in the usual way.

KAY, L.J.:—

I entirely agree with the Lord Justice upon the construction of Order XXXI., rule 26. [His Lordship read the rule, and continued:—]

The party seeking discovery has to pay £5 in before he applies for discovery; therefore the order contemplated cases where he may be further ordered to pay another sum, which must be some order made after his application. It was suggested that it must mean the first order, the order granting the leave to have discovery. I agree with Lord Justice *Lindley* that that would be a most narrow and most inconvenient construction of this rule. I see no reason whatever why, if the circumstances arise to make it proper that a further sum should be paid in, even after the order for discovery has been made, there should not be a further order for payment in of a further sum. So much for the rule. Now, in this case the Court is in a difficulty, which I personally have experienced many a time, of knowing how to exercise this part of the Court's jurisdiction without acting most oppressively towards one party or the other. This action is so framed that it requires the accounts of trustees from the year 1876, the action having been brought in December, 1889. The trustees sold the property, which they held in trust for creditors, some time in 1885—a good many years ago; and the action has two objects—first of all, to impeach that sale; and secondly, to have the accounts of the trustees taken from the very first, in 1876. And the pleadings, I must confess, do credit to the ingenuity of the

pleader, because, looking through them carefully, the two sets of relief are intermingled so that the accounts of the trustees, and the results of those accounts may be very material indeed upon the question whether the sale can be set aside or not. For example, I take the statement of claim, and at a mere glance I find that the trustees are stated to have taken possession of the business, to have carried it on, to have made annually very large profits, and that one of them was manager of the *Barrow Hæmatite Steel Company*, who are Defendants, and to whom the property was ultimately sold, and that, while he was manager of that company, he supplied on behalf of that company steel rails and other materials requisite for carrying on the business, and regularly made charges therefor, largely in excess of the market price, and much above the prices charged to other customers. This is stated as a thing habitually done by one of these trustees. Then in the next paragraph it is said: "The trustees did not pay and divide in accordance with the trusts, but at various times expended very large sums thereout in the improvement of the works of the said partnership, by the purchase and erection of new and improved machinery, the whole of such expenditure amounting altogether to £20,000, or thereabouts;" and then it alleges in 1883 they proposed to sell the property to the *Barrow Hæmatite Steel Company*, those Defendants agreeing to pay the other creditors the balance then due to them; that they obtained the assent of the creditors to such proposed sale by misrepresenting to them the value of the assets, and the position of the business, and the amount due to the creditors. All those statements are made for the purpose of leading up to this result, that the sale was invalid—partly in consequence of those fraudulent acts which the trustees had done in carrying on the business. We proposed during the argument to limit the discovery to such documents as were relevant to the issue, whether this sale should be set aside or not; and Mr. *Mansfield* seemed very anxious to accede to that, and I see why. Because practically that would not limit the discovery. Practically, it seems to me, upon these pleadings, if the order had been so worded, almost, if not quite, the very same documents would have had to be produced upon that issue which will be wanted for the purpose of

C. A. 1891 COOKE v. SMITH. Kay, L.J.

the whole of the accounts; therefore our effort, made for the purpose of saving both parties' costs, I am afraid must fail.

Now, the course which the learned Judge, who, no doubt, has experienced these difficulties that we feel, took was this: An application was made to him, after the usual order for discovery had been made, for an increase of the amount paid into Court, and he directed the increase to the sum of £100, and he gave liberty to apply to reduce that sum in case they could limit in some way or other the discovery. I wish incidentally to mention that I dissent entirely from one point taken by Mr. *Mansfield*. He said the trustees will not have any trouble; they can put all the documents into bundles, and mark the bundles. I beg to say that is not the way in which discovery should be made. It has been settled, I believe, without the least dissent for years past, that such a proceeding would not be proper. You must not only make up the documents in bundles, but you must describe what the documents are — for example, a bundle of letters from A to B; and you must identify each document by marking it specially. I quote the words of Lord Justice *Cotton*, in one of the last cases, *Hill* v. *Hart-Davis* (1): "They ought to have been set out in bundles, and scheduled and numbered in such a way that the defendant might have asked for those which he wanted to see, specifying them by their numbers." All the cases on that subject are collected at p. 228 in the last edition of Mr. *Bray's* very useful book on the Law of Discovery. What the trustees are required to do is to look through all the documents that have come into their possession, all the documents that have been created since the year 1876, to make out which of these are relevant to the issue which has to be tried at the trial of this action, and then to mark each one of these documents, and identify it in such a way that the Plaintiff who requires discovery could say, "I want to see this particular document." The trustees say that this would involve enormous labour, and I can readily believe it; and in default of being able to find any other way of preventing this order being a very great oppression on the trustees, I think that this course which the learned Judge has taken was a proper and considerate course,

(1) 26 Ch. D. 470, 472.

and I am altogether disinclined to dissent from it. If any other way could have been suggested which would have relieved the trustees from some of the difficulty in which they are put by this order, and if that course could have been assented to by the parties, speaking for myself, I should have been very ready to accede to it. I think the appeal must be dismissed.

Solicitors: *Currey, Holland, & Currey; Redpath, Holdsworth, & Marshall; Trass & Jarmain.*

M. W.

CHITTY, J.

1891.
Jan. 30;
Feb. 3, 7.

In re DRUMMOND & DAVIE'S CONTRACT.

Conveyance—Tenant in Tail—Base Fee—Fee Simple Absolute—Married Woman—Acknowledgment by—Concurrence of Husband—Fines and Recoveries Act (3 & 4 *Will.* 4, *c.* 74), *ss.* 1, 15, 19, 40, 77 [*Revised Ed. Statutes, vol. vii., pp.* 487, 493, 494, 499, 511]—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 1, *s.* 2.

By an indenture, dated in 1884, and duly enrolled, *A.* and *B.* being then spinsters, and entitled, as tenants in tail in remainder under the will of *W.*, to certain lands, barred their estates tail, and conveyed the lands to *S.*, thereby passing to *S.* a base fee in remainder, the consent of the protector of the settlement not having been obtained.

In August, 1889, the protector of the settlement died, and the base fee fell into possession. *A.* and *B.* married after the commencement of the *Married Women's Property Act*, 1882.

In December, 1889, *A.* and *B.*, being then married, executed an indenture, which was duly enrolled, for the purpose of turning the base fee into a fee simple absolute in favour of *S.* This deed was in the usual form, but was not acknowledged by *A.* and *B.*, nor did their husbands concur in it. The deed purported to convey and dispose of the lands to the use of *S.* in fee, discharged not only from the estates tail barred by the indenture of 1884, but also from all remainders over on the determination or in defeasance of such estates.

On a sale of part of the lands, the purchaser took an objection to the title on the ground that the indenture of December, 1889, had not been acknowledged by *A.* and *B.*, nor concurred in by their husbands, as required by sect. 40 of the *Fines and Recoveries Act*:—

Held, that the effect of sect. 1, sub-sect. 1, and sect. 2 of the *Married Women's Property Act*, 1882, was, under the circumstances, to render the acknowledgment of the deed of December, 1889, by *A.* and *B.*, and the concurrence therein of their husbands, as required by sect. 40 of the *Fines and Recoveries Act*, unnecessary, and that therefore the deed was effectual to pass the fee simple absolute to *S.*

Adjourned Summons.

At the date of the indenture next hereinafter stated, a certain farm, called *Clog*, in the county of *Carmarthen*, stood limited by virtue of the will of the late Sir *James Williams* to the use of *Gerard James Noel*, his heirs and assigns, upon certain trusts which were then satisfied, and, subject thereto, to the use of the said *Gerard James Noel* during the life of *Edwina Augusta Ferguson Davie*, the wife of *John Davie Ferguson Davie*, without

impeachment of waste, upon trust for her separate use for life, without power of anticipation, with remainder to uses in favour of the issue of the said *Edwina Augusta Ferguson Davie*, and in default of such issue, and from and after her decease as to one moiety (hereinafter called the *Fane* moiety) of the said farm and hereditaments, to the use of the daughters of the late *Susan Hester Fane*, namely, *Marion Elizabeth Stucley*, *Eveline Harriet Fane*, *Christine Louisa Fane*, and *Constance Edwina Adelaide Fane*, as tenants in common in tail general, with cross remainders between them in tail general, with remainders over.

By an indenture, dated the 21st day of August, 1884, and made between the said *Eveline Harriet Fane* of the first part, the said *Christine Louisa Fane* of the second part, the said *Constance Edwina Adelaide Fane* of the third part, and the said *Marion Elizabeth Stucley* of the fourth part, and duly enrolled every of them the said *Eveline Harriet Fane*, *Christine Louisa Fane*, and *Constance Edwina Adelaide Fane*, as and according to the several parts or shares, estates, and interests to which she was entitled as tenant in tail, whether originally or by way of cross remainder expectant on the estate in tail of any sisters of hers, granted to the said *Marion Elizabeth Stucley*, her heirs and assigns, the *Fane* moiety of and in the said farm and hereditaments, to hold the same unto and to the use of the said *M. E. Stucley*, her heirs and assigns, subject and without prejudice to the estates, charges, and incumbrances, limited by the said will of the said Sir *James Williams*, or by reference thereto, which were prior to the estates thereby limited to the daughters of the said *Susan Hester Fane*, in tail originally or to the estates thereby limited by way of cross remainders, between such daughters respectively, and to the powers annexed to such preceding estates and any estates or interests limited in exercise of such powers, or such of them as were then subsisting and capable of taking effect, but freed and discharged from all estates in tail whatsoever of the said *Eveline Harriet Fane*, *Christine Louisa Fane*, and *Constance Edwina Adelaide Fane*, and every of them, and all remainders, reversions, estates, rights, titles, interests, and powers, to take effect after the determination or in defeasance of such estates tail, or of each and every of them.

CHITTY, J.
1891
In re DRUMMOND & DAVIE'S CONTRACT.

On the 12th of August, 1885, the said *Constance Edwina Adelaide Fane* intermarried with *John Thomas* Baron *Manners*, and on the 11th of June, 1889, the said *Christine Louisa Fane* intermarried with *Frederick Hamlyn*.

On the 15th of August, 1889, the said *Edwina Augusta Ferguson Davie* died without having had any issue.

By an indenture, dated the 7th day of December, 1889, and made between the said *Eveline Harriet Fane* of the first part, the said *Christine Louisa Hamlyn* of the second part, the said *Constance Edwina Adelaide*, Lady *Manners*, of the third part, and the said *Marion Elizabeth Stucley* of the fourth part, and duly enrolled in order to defeat all remainders, reversions, estates, rights, titles, interests, and powers, to take effect, after the determination or in defeasance of the base fees into which the estates tail of the said *Eveline Harriet Fane*, *Christine Louisa Hamlyn*, and *Constance Edwina Adelaide*, Lady *Manners*, were respectively converted by the operation of the indenture of the 21st of August, 1884, and in order to enlarge the base fee of the said *Marion Elizabeth Stucley* in the several parts or shares by the same indenture expressed to be granted of the moiety and hereditaments therein described, into a fee simple absolute, and to perfect the title of the said *Marion Elizabeth Stucley* to the same shares, the said *Eveline Harriet Fane*, *Christine Louisa Hamlyn*, and *Constance Edwina Adelaide*, Lady *Manners*, respectively, as and according to the several parts or shares, estates, and interests to which she respectively became entitled as tenant in tail, whether originally or by way of cross remainders expectant on the estate in tail of any sisters of her, granted, disposed of, and confirmed to the said *Marion Elizabeth Stucley*, her heirs and assigns, the *Fane* moiety of the said farm and hereditaments, to hold the same to the use of the said *M. E. Stucley*, her heirs and assigns, for ever, subject and without prejudice to the estates, charges, and incumbrances limited by the said will of the said Sir *James Williams*, or by reference thereto which were, prior to the estates thereby limited to the daughters of the said *Susan Hester Fane* in tail general, originally or to the estates thereby limited by way of cross remainders, between such daughters respectively, and to the powers annexed to such preceding estates, and any

estates or interests limited in exercise of such powers or such of them as were then subsisting and capable of taking effect, but freed and discharged from all remainders, reversions, estates, rights, titles, interests, and powers, to take effect after the determination or in defeasance of the base fees into which such estates tail respectively were converted by the operation of the said indenture of the 21st of August, 1884, and every of them.

On a sale of part of the lands the purchaser took an objection to the title on the ground that the indenture of December 1889, had not been acknowledged by the married women nor concurred in by their husbands as required by sect. 40 of the *Fines and Recoveries Act*, and subsequently took out a summons for the purpose of having it declared that the deed was consequently inoperative, and that a good title to the lands had not been shewn.

This summons was adjourned into Court.

Byrne, Q.C., and *Cruickshank*, in support of the summons:—

Sect. 1, sub-sect. 1 of the *Married Women's Property Act*, 1882, is this: "A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee"; and sect. 2 enables a married woman who marries after the commencement of the Act to have and to hold as her separate property, and to dispose of all property belonging to her at the time of the marriage.

Sect. 1, sub-sect. 1, introduces an entirely new right on married women to relieve them from the necessity of having a trustee, but does not give them larger powers of disposing of property than they have under sect. 2: *In re Cuno* (1).

Sect. 2 only enables a married woman to dispose of property which belongs to her, and we say that when these ladies married they had no property within the meaning of the *Married Women's Property Act*, 1882. They had absolutely parted with the base fee, and could not enlarge it into a fee simple. The 19th section

(1) 43 Ch. D. 12.

CHITTY, J. 1891 *In re* DRUMMOND & DAVIE'S CONTRACT.

of the *Fines and Recoveries Act*, as to enlarging a base fee, does not apply to a person who no longer has that fee, but if it does, the power of enlarging it must be exercised according to the powers prescribed by sect. 40, which requires the concurrence of the husband and the acknowledgment by the wife. In the Act of 1882, there is no repeal of the formalities required by the *Fines and Recoveries Act*, and an intention on the part of the legislature to remove the fetters imposed by that Act cannot be implied: *In re Smith's Estate* (1).

A married woman tenant in tail cannot dispose of lands except in accordance with the provisions of sect. 40: *Cooper* v. *Macdonald* (2).

We submit that the deed of December 1889 was inoperative.

[They also referred to *Bankes* v. *Small* (3), and *Taylor* v. *Meads* (4).]

Maclean, Q.C., and *Maidlow*, for the vendors:—

There is nothing in the objection raised by the summons.

Sect. 77 of the *Fines and Recoveries Act*, provides that it shall be lawful for every married woman in every case, except that of being tenant in tail, by deed to dispose of any lands as fully and effectually as she could do if she were a *feme sole*; and sect. 1, sub-sect. 1 of the *Married Women's Property Act*, 1882, enables a married woman to dispose of any real or personal property as if it were her separate property. There is nothing in the Act to say she cannot deal with property of which she is tenant in tail.

Then as to the objection that a tenant in tail who has converted his estate tail into a base fee cannot enlarge that base fee into a fee simple absolute, there is an express recognition in sect. 35 of the *Fines and Recoveries Act* of the power to enlarge the base fee: *Bankes* v. *Small*.

Under the old law a tenant in tail having by fine obtained a base fee, though the fine had extinguished the estate tail, was able to suffer a recovery, and everything was treated as if the estate tail had not been barred, and, not only so, but even if he died without suffering a recovery, the privilege descended to his heir

(1) 35 Ch. D. 589.
(2) 7 Ch. D. 288.
(3) 36 Ch. D. 716.
(4) 4 D. J. & S. 597.

under the entail, who would suffer a recovery and extinguish the remainders (1).

We submit the deed operated to pass the fee simple absolute to Lady *Stucley*.

Byrne, in reply, referred to *Challis* and *Holt's* Law of Real Property (2), and *Roe* v. *Baldwere* (3).

CHITTY, J.:—

The purchaser objects to the title on the ground that the indenture of the 7th of December, 1889, was not acknowledged by two married ladies, and that their husbands did not concur therein in accordance with the provisions of the Act for the abolition of *Fines and Recoveries* as amended by the *Conveyancing Act*, 1882.

The facts are as follows:—By indenture dated in 1884, and duly enrolled, the two ladies, being then spinsters and tenants in tail in remainder, as to certain undivided shares in the land, barred their estates tail and conveyed the lands as to their undivided shares to Lady *Stucley* for the base fee thereby created. Although the deed purported to convey the remainders over, its legal effect (as the consent of the protector of the settlement was not obtained), was to pass merely a base fee. The two ladies afterwards married, their marriages taking place after the commencement of the *Married Women's Property Act*, 1882. Subsequently to both the marriages, namely, in August, 1889, the protector of the settlement died and the base fee fell into possession. Thereupon, the two ladies executed the indenture of December, 1889 (which was duly enrolled) for the purpose of enlarging the base fee into a fee simple absolute in favour of Lady *Stucley*. It was not acknowledged by the married ladies, nor did their husbands concur in it. This deed is in the usual form. It purports to convey and dispose of the lands for the undivided shares of the grantors to the use of Lady *Stucley* in fee discharged not merely from the estates tail (previously

(1) *Fearne's* Posthumous Works, p. 442; *Burton's* Compendium, s. 706; *Preston's* Conveyancing, vol. i. s. 126; *Pigott* on Recoveries, p. 21.

(2) Page 52.

(3) 5 T. R. 104.

CHITTY, J. 1891 *In re* DRUMMOND & DAVIE'S CONTRACT.

barred), but also from all remainders over or in defeasance of such estates.

The question turns upon the effect which the *Married Women's Property Act*, 1882, has, as to women married after its commencement upon the provisions as to married women contained in the *Fines and Recoveries Act*. The principal sections of these statutes are the 1st sub-sect. 1, and the 2nd of the former Act, and the 1st, 15th, 19th, 40th, and 77th of the latter Act. The object of the latter Act, as appears from its title and its provisions, was to abolish the cumbrous and expensive proceedings of *Fines and Recoveries* and to substitute more simple modes of assurance. In the case of married women acknowledgment of the deed was substituted for the separate examination in Court, and the concurrence of the husband was retained because his consent was required where his wife was party to the fine or recovery on the ground of his interest and of the necessity that he should be party to proceedings in which his wife was concerned. Neither the concurrence of the husband nor the acknowledgment by the married woman was required for the purpose of protecting the settlement; special provisions for that purpose are separately made by the Act. Speaking generally, it was an object of the *Married Women's Property Act*, 1882, to remove the disability of coverture and to enable a married woman to hold and dispose of property as if she were a *feme sole*.

Now in order to arrive at the right conclusion in this case, it appears to be convenient to consider the position of a married woman under the two statutes in reference to real property; first, where she is tenant in fee simple; secondly, where she is tenant in tail in possession or remainder; and thirdly, where she has barred her estate tail and the base fee has fallen into possession. As I have to deal only with the case of a woman married since the commencement of the Act of 1882, I must be understood when speaking of a married woman in this judgment as meaning generally a woman married after the commencement of the Act of 1882.

First, as to the lands of which a married woman is tenant in fee-simple in possession or remainder, the 77th section of the *Fines and Recoveries Act* in substitution for the old fine enables

her by deed to dispose of such lands as effectually as she could do if she were a *feme sole*, save that no such disposition shall be valid unless the husband concurs in the deed and it is acknowledged. Sect. 1, sub-sect. 1, of the Act of 1882, read in connection with the 2nd section of the same Act, enables her to acquire and "dispose of" all real property belonging to her at the marriage, or acquired by, or devolving upon her subsequently as if she were a *feme sole*. It cannot be doubted that the effect of the Act of 1882 is to abolish in such cases the necessity of the concurrence of the husband and of the acknowledgment of the deed, and thus to enable the married woman to make a valid disposition of her fee simple lands whether in possession or in remainder. If any support could be required for this opinion, it would be found in the decision of Lord *Westbury* in *Taylor* v. *Meads* (1), where, overruling the Court below, he held, that notwithstanding the 77th section of the *Fines and Recoveries Act*, a married woman could without acknowledged deed, or the concurrence of her husband dispose for an equitable estate in fee of lands limited to her in fee simple for her separate use.

Secondly, where the married woman is tenant in tail in possession or remainder. By the 40th section of the *Fines and Recoveries Act*, the disposition of the land by tenant in tail must be by deed, but if the tenant in tail is a married woman, the same restrictions as to the concurrence of the husband and the acknowledgment as are found in the 77th section are imposed on her disposition to render it effectual. These restrictions imposed simply in reference to the disability of coverture and the interest of the husband appear to me to be also removed by sect. 1, sub-sect. 1, and sect. 2 of the Act of 1882. The restriction being thus removed, her disposition takes effect under and subject to sect. 15, and the other provisions of the *Fines and Recoveries Act*, just as if she were a *feme sole*. Consequently, where she is tenant in tail in possession, her disposition bars the remainders over and passes a fee simple absolute, where she is tenant in tail in remainder her disposition without the consent of the protector bars the estate tail and creates a base fee.

I should not have entered upon the examination of these two

(1) 4 D. J. & S. 597.

CHITTY, J. 1891 *In re* DRUMMOND & DAVIE'S CONTRACT.

questions had I not thought the discussion would assist in arriving at the right answer to the actual question which arises in this case. This precise question turns upon the 19th section of the *Fines and Recoveries Act* read in connection with the 1st, 15th, and 40th, and the other sections of that Act, and the 1st section sub-sect. 1, and the 2nd section of the Act of 1882. The 19th section applies where an estate tail has been barred and converted into a base fee, and in such case it empowers the person, who if such estate had not been barred would have been actual tenant in tail "to dispose" of the lands as against all persons whose estates are to take effect after the determination or in defeasance of the base fee into which the estate tail has been converted "so as to enlarge the base fee into a fee simple absolute." For the definition of the terms "base fee," "actual tenant in tail," and "tenant in tail," reference should be made to sect. 1 of the Act. According to that section, "actual tenant in tail" means exclusively the tenant of an estate tail which shall not have been barred, and such tenant shall be deemed an actual tenant in tail, although the estate tail may have been divested or turned to a right; and "tenant in tail" means not only actual tenant in tail but also a person who where an estate tail has been barred and converted into a base fee would have been tenant of such estate tail if the same had not been barred.

The power or right of enlarging the base fee is by the 19th section conferred, not on the person in whom the base fee is vested, but on the person who would have been actual tenant in tail had the estate not been barred. Where such person is a married woman, the restrictions imposed by the 40th section apply to her disposition under the 19th section. The 19th section did not create a new right, but merely substituted a new and simpler mode of disposing of the lands for a fee simple absolute than that which previously existed. It was clear when the Act was passed that tenant in tail after he had barred the estate tail by fine could afterwards by suffering a recovery bar the remainder over. There was indeed a question at one time whether the issue in tail could, after the estate tail had been barred by the ancestor's fine, bar the remainder over, but the better opinion was that the issue could do so. For authority on

these points it will be sufficient to refer to the elaborate opinions of Mr. *Fearne* in his posthumous works (1), and the decisions there cited, and to *Preston* on Conveyancing (2), and *Burton's* Compendium (3).

It is not surprising to find that the older lawyers were not agreed as to the reason why the recovery had this effect; perhaps the least fictitious and the most intelligible to modern lawyers among the many reasons given is that a recovery was in substance regarded merely as a conveyance, and that a tenant in tail who by levying a fine and thus defeating or divesting the estate tail and turning it into a right had made the less operative conveyance, had not thereby destroyed his right to make the more sweeping conveyance by a recovery (4). Whether, after the conveyance by fine to a third person, there remained in the tenant in tail a *scintilla juris*, or the estate tail was still deemed to subsist in him so as to make a subsequent recovery suffered by him effectual, by whatever name, more or less artificial, his right was called and on whatever reason, however fictitious, his right was founded, it is clear that by a subsequent recovery he could convert the base fee created by a fine into a fee simple absolute. This right of completely unfettering the estate, and conveying the whole fee may, if not with perfect precision, at all events with sufficient accuracy be described "as real property belonging to" him.

Now, it would be a strange and anomalous result of the two Acts of Parliament under consideration if a married woman can by deed, not acknowledged, and without the concurrence of her husband, dispose of the lands for a fee simple absolute where she is tenant in tail in possession, but cannot dispose of the lands so as to enlarge the base fee into a fee simple absolute when the base fee has fallen into possession merely because she has, either when *sole* or *covert*, disposed of the lands for a base fee while her estate tail was in remainder.

The argument for the purchaser was that the 19th section of the *Fines and Recoveries Act* conferred a mere power, and that this statutory power must be exercised strictly according to the statute by a married woman—that is, by acknowledged deed, and

(1) Pages 442, 468.
(2) Page 126.
(3) Page 706.
(4) *Fearne's* Posthumous Works, p. 460.

CHITTY, J. 1891 *In re* DRUMMOND & DAVIE'S CONTRACT.

with the concurrence of her husband. This argument, if pressed to its extreme length, would, as it seems to me, result in denying to the married woman (married after the Act of 1882) the right of disposing of the lands of which she is tenant in fee simple or in fee tail. The contention for the purchaser was that the ladies, having disposed of the lands for a base fee to Lady *Stucley*, by the deed of 1884, there remained in them no estate, or interest, or property at the times of their marriage, and consequently that it cannot be said as to these lands that there was any real property which belonged to them at their marriage, or which were acquired by or devolved upon them afterwards, within the meaning of the 2nd section of the Act of 1882.

It was urged that these words cut down the meaning of the words in the general enabling section (sect. 1, sub-sect. 1), which confer on married women the capacity of "disposing of any real property as her separate estate, as if she were a *feme sole*." In support of the argument, reliance was placed upon the decision of the Court of Appeal in *In re Cuno* (1), where it was held that the force of the general enabling section was restricted by the 5th section, in the case of a woman married before the commencement of the Act, a case with which I am not dealing. Marriage before and marriage after the commencement of the Act stand obviously on different footings. When the marriage had taken place before the Act, an interest had already vested in the husband, of which it would be unjust to deprive him by a retrospective enactment.

But I do not question the proposition that, in the case of a woman married after the commencement of the Act, reference may properly be made to the 2nd section. Taking the two sections together, I see no reason for adopting the narrower construction for which the purchaser contends. When Acts of Parliament are open to two interpretations, the Court is at liberty to adopt that which is the more reasonable and which makes the enactments as a whole consistent. The phrase in the 19th section of the *Fines and Recoveries Act* is "dispose of the lands," a phrase which constantly occurs in other parts of the Act. It tallies with the phrase "dispose of any real property"

(1) 43 Ch. D. 12.

in sect. 1, sub-sect. 1, of the Act of 1882. The terms "any real property which shall belong to her" in the 2nd section (although terms not unusual among lawyers) are not highly technical terms requiring a perfectly strict construction, such, for instance, as the word "seised." The case of *In re Smith's Estate* (1) is distinguishable. There it was held that, where a restricted power was conferred on a married woman for a special object by a particular statute (43 Geo. 3, c. 108), which itself created an exception out of a former general prohibitory statute, the restrictions on the power were not removed by a general enabling Act (the Act of 1882). In the case before me I am dealing with two general Acts.

In the result, for the reasons above stated, I hold that the deed of December, 1889, was effectual to pass the fee simple absolute. The order should be drawn, stating my opinion to that effect. The purchaser must pay the costs.

Solicitors: *Daniel Jones, & Linnett,* agents for *W. Morgan Griffiths, Carmarthen; Church, Rendell, Todd, & Co.,* agents for *Pitts-Tucker, & Sons, Barnstaple.*

(1) 35 Ch. D. 589.

G. M.

NORTH, J.
1890
Oct. 28, 29;
1891
Jan. 14.

In re QUEENSLAND MERCANTILE AND AGENCY COMPANY.
Ex parte AUSTRALASIAN INVESTMENT COMPANY.
Ex parte UNION BANK OF AUSTRALIA.

Conflict of Law—Company—Unpaid Capital—Debenture—Scotch Judicial Process—Arrestment—Notice—Priorities.

The *U. Bank* held debentures issued by the *Q. Company*, charging the unpaid capital in respect of shares in the *Q. Company*. The *Q. Company* were domiciled in *Queensland*. After such capital had been called but not paid, the *A. Company* commenced an action in *Scotland* against the *Q. Company*, and arrested the calls on the shares in the *Q. Company* held in *Scotland*: the holders of such shares had no notice of the debentures.

The *Q. Company* was ordered to be wound up in *Queensland*, and also in *England*. The claim of the *A. Company* was adjusted in the *Queensland* winding-up.

It was in evidence that under Scotch law the arrestment was equivalent to an assignment with intimation or notice to the debtor and took priority over an earlier assignment without intimation. The law of *Queensland* in respect of the matters in question is the same as that of *England*:—

Held, in the English winding-up, that the question of priority on the proceeds of Scotch shares was regulated by the law of *Scotland*, and that the *A. Company* had the first charge on such proceeds.

THIS was the hearing of two summonses in the winding-up in *England* of an Australian company, which was also being wound up in *Australia*.

One summons was by the *Union Bank of Australia, Limited*, an English company, that the English liquidator might be ordered to transfer to them the sums of New Consols and cash standing in his name, representing the proceeds of calls in his hands in respect of shares in the company being wound up, numbered 1 to 2500 inclusively.

The other summons was by the *Australasian Investment Company*, that out of the sum of £24,730 12*s.* 2*d.* New Consols and any cash in his hands or in Court representing money received from Scotch shareholders in the company in liquidation, the sum of £12,666 4*s.* 5*d.*, might be paid to the applicants in priority over all other payments out of the said funds. This summons

also asked that, if necessary, a case might be remitted to the Court of Session in *Scotland*, under the statute 22 & 23 Vict. c. 63, s. 1, for the purpose of ascertaining the law of *Scotland* relative to matters of Scotch law involved.

The *Queensland Mercantile and Agency Company* was registered in *Brisbane*, and for several years before it was wound up carried on business in *Queensland*. The bankers of that company were the *Union Bank of Australia*, who, on the 28th of June, and the 3rd of September, 1866, took from the *Queensland Company* two debentures of £10,000 and £50,000 respectively in similar form, whereby the payment of such debentures was made a first charge on the uncalled capital made receivable in respect of shares numbered from 1 to 2500 in the *Queensland Company*, upon each of which shares £50 had been paid up and £50 more remained uncalled.

Omitting formal parts, the debenture for £10,000 was as follows:—

"The *Queensland Mercantile and Agency Company, Limited* (hereinafter called, 'the company'), will, on the 30th day of June, 1891, pay to the *Union Bank of Australia, Limited*, their successors or assigns, on presentation of this debenture, the sum of £10,000 sterling.

"The company will in the meantime pay at its registered office for the time being interest thereon at the rate of £6 per centum per annum by equal half-yearly payments on every 31st day of December and 30th day of June.

"The company hereby charges with such payments the uncalled capital, receivable in respect of the company's shares, Nos. 1 to 2500, both inclusive.

"This debenture is issued subject to the following conditions, viz.:—

"This debenture shall, with three others previously issued, each securing the principal sum of £5000 sterling, rank *pari passu* as a first charge upon the said uncalled capital without any preference or priority one over another, but so that the company is not to be at liberty to create any mortgage or charge in priority to this or the said three other debentures.

"The company shall be at liberty from time to time to make

NORTH, J. 1891 *In re* QUEENSLAND MERCANTILE AND AGENCY COMPANY. *Ex parte* AUSTRALASIAN INVESTMENT COMPANY. *Ex parte* UNION BANK OF AUSTRALIA.

and receive payments of any calls upon the said first issue of capital.

"The principal money hereby secured shall immediately become payable, if an order is made or an effective resolution is passed for the winding-up of the company, unless such resolution shall declare that such winding-up is for the purpose of or with a view to the reconstruction of the company.

"Every transfer of this debenture must be in writing, under seal of the said *Union Bank of Australia, Limited*, or under the hand and seal of the duly constituted attorney of the said bank."

The debenture for £50,000 was in similar form, except that it was made subject to the four others previously issued, three for £5000, and one for £10,000, being the debenture above mentioned.

In December, 1886, the company passed resolutions calling up the balance of £50 per share, payable by equal instalments in February, April, June, and August, 1887, respectively. Notice of the call was given to the shareholders, but they never had any notice of the charge effected by the said two debentures in favour of the *Union Bank*. On the 24th of February, 1887, a Scotch company, called the *Australasian Investment Company*, commenced an action in *Scotland* against the *Queensland Company* for negligence, and immediately afterwards, on the same day issued a Scotch process known as arrestment on the dependence of the action, against numerous holders of the *Queensland Company's* shares who were resident in *Scotland*, the effect of which was that the calls payable by them to the *Queensland Company* were arrested in their hands, and the *Australasian Company* (the Pursuers in the action) became secured creditors on the funds so arrested for the amounts for which they should establish their claim in the action. By the terms of the order of arrestment the sums arrested were required "to remain in the hands of the arrestees under sure fence and arrestment at the instance of the Pursuers, aye and until sufficient caution and surety be found acted in the books of Council and Session that the same shall be made forthcoming to the said Pursuers as accords of law conform to the summons in all points."

In the months of May, July, and August, 1887, judgments were recovered in *England* in twenty-seven actions by one *Drake* and others against the *Queensland Company*. On the 2nd of September, 1887, the *Union Bank* commenced an action in *England* against the *Queensland Company* in respect of money due to them other than that secured by the two debentures, and on the 7th of September an order was made in all those actions for the appointment of a receiver to get in the calls from the shareholders in the *Queensland Company*.

On the 28th of October, 1887, an order was made in *Queensland* for the winding-up of the *Queensland Company*, and thereupon the £60,000 secured by the two debentures above mentioned became payable. On the 14th of January, 1888, a similar order was made in *England*. By various proceedings and orders in *England* and in *Scotland*, to which it is not necessary to refer in detail, the *Australasian Company* were restrained from further prosecuting their action in *Scotland*, but without prejudice to the security, if any, upon the amounts payable by the Scotch shareholders in the *Queensland Company* in respect of the said calls which the *Australasian Company* had acquired by the proceedings taken by them in *Scotland*; and the official liquidator received from the receiver, or himself collected, and now held on separate accounts the amounts paid for calls by the Scotch and English shareholders respectively, the receipts from the Scotch shareholders being about £24,730. By proceedings in the winding-up in *Queensland* the amounts due from the *Queensland Company* to the *Union Bank* were ascertained at upwards of £74,000; but it was admitted that, after allowing for securities held by them, their claim was reduced in round figures to £31,000.

On the hearing of the summonses the *Union Bank* asked for an order upon the official liquidator to transfer to them on account of their claim the sums he has thus received in respect of the shares numbered 1 to 2500, including those received from the Scotch shareholders. The *Australasian Company* claimed, on the other hand, to be first paid out of the moneys received from the Scotch shareholders, £12,666 4*s*. 5*d*., which had been found in the English winding-up to be the amount of the claim due to them. The Plaintiffs in the actions of *Drake* and others against the *Queensland Company* also asserted a claim to the funds in

NORTH, J.
1891
In re QUEENSLAND MERCANTILE AND AGENCY COMPANY.
Ex parte AUSTRALASIAN INVESTMENT COMPANY.
Ex parte UNION BANK OF AUSTRALIA.

hand against both the *Union Bank* and the *Australasian Company*, upon the ground that as against them the debentures were inoperative.

The only evidence of the law of *Scotland* bearing on the matters in question was contained in an affidavit made in the matter by *John Blair*, writer to the signet, a member of the firm in *Edinburgh* who were the solicitors of the *Australasian Investment Company*. The effect of it is stated in the judgment.

Sir *Horace Davey*, Q.C., *Buckley*, Q.C., and *Samuel Dickinson*, for the *Union Bank of Australia*:—

As to what Scotch law is in fact, we have no evidence on our side, and we do not desire to put in evidence or to have an issue directed to be tried by a Scotch Court. But, at the same time, we do not admit that the view of Mr. *Blair* is correct, and in case our application goes to the House of Lords, we reserve our right to take the decision of that Court on the question of Scotch law.

The priority as between the claimants to such a *chose in action* as a debt is to be determined by the law of the domicil of the creditor who is the owner—in this case *Queensland*, a colony whose law in this respect is admittedly the same as that of *England*: *Hunter* v. *Potts* (1); *Sill* v. *Worswick* (2); *Story's* Conflict of Laws (3); *Colonial Bank* v. *Cady* (4). That rule of international law is one recognised so strongly in this country that an English Court has gone so far as to disregard the judgment of a foreign Court *in rem* where the English Court considered it had been disregarded: *Simpson* v. *Fogo* (5). The law of *Scotland* has, therefore, no bearing on the question now before the Court. However, we submit that such evidence as there is shews that the arrestment amounts only to a judgment, and cannot be considered by this Court as anything else. The process only operated upon such interest as the person against whom it was proved had in the property arrested, and did not affect the interest of the debenture-holders. Under the law of *England* the calls had prior to the arrestment been effectually charged in favour of the debenture-holders, and anyone claiming under a subsequent

(1) 4 T. R. 182.
(2) 1 H. Bl. 665.
(3) Ch. IX. s. 374, *et seq.*
(4) 15 App. Cas. 267.
(5) 1 H. & M. 195.

judicial process against the assignors can only take subject to the prior charge: *Badeley* v. *Consolidated Bank* (1); *Ex parte Whitehouse* (2); *Eyre* v. *McDowell* (3). No doubt, a subsequent assignee for value without notice of a prior charge might get priority. But the doctrine of notice has no application in favour of a judgment creditor. His debt is not incurred on the faith of there being no prior charge, and he has no higher right to the property than his debtor.

Crackanthorpe, Q.C., and *Rawlins*, for the *Australasian Investment Company*:—

The only evidence before the Court as to what the law of *Scotland* is is conclusive that the assignment of the calls by the debentures, if it was ever an inchoate assignment, was ineffectual at the time of the arrestment for want of intimation or notice, and that the arrestment constituted an effectual assignment of the calls, having priority over any other assignment perfected by subsequent intimation; if, then, the law of *Scotland* is to prevail (as we contend it does), the cases cited as to a judgment debt being postponed as a charge to previous equitable assignments, though without notice, such as *Whitworth* v. *Gaugain* (4), have no application.

Again, the case of *Simpson* v. *Fogo* (5) is not altogether in point. It related to a ship which happened to go to *New Orleans*, where it was adjudicated upon by the *Louisiana* Court. *New Orleans* was not the place where the property was situated when the obligations in competition were incurred. Moreover, it is to be observed that the question of maritime law had to be taken account of. We fully submit that for many purposes the law of the domicil of the owner of property regulates the question to whom it passes. If he dies, it passes under a will made in accordance with the law of his domicil; if he dies intestate, the persons who take are regulated by the law of his domicil. But, as *Story* points out in the chapter in his Conflict of Laws (6) dealing with this subject, every State has a right to impose the

(1) 34 Ch. D. 536; 38 Ch. D. 238.
(2) 32 Ch. D. 512.
(3) 9 H. L. C. 619.
(4) 1 Ph. 728.
(5) 1 H. & M. 195.
(6) Ch. IX. s. 374, *et seq.*

NORTH, J.
1891
In re QUEENSLAND MERCANTILE AND AGENCY COMPANY. *Ex parte* AUSTRALASIAN INVESTMENT COMPANY. *Ex parte* UNION BANK OF AUSTRALIA.

forms and conditions under which all property situate in that State shall be disposed of: *Story* in Conflict of Laws (1). Accordingly, in the English bankruptcy of foreigners, the English assets are distributable according to English law. Again, a bequest in the will of a domiciled Englishman of personal estate to be laid out for charitable purposes in land in *Scotland* is not necessarily bad.

The well-known general passage in the judgment of Lord *Loughborough* in *Sill* v. *Worswick* (2), taken in connection with what leads up to it, and the authorities there referred to—*Wilson's Case* (3); *Le Chevalier* v. *Lynch* (4); *M'Intosh* v. *Ogilvie* (5)—do not establish the broad, unlimited contention of the other side.

The result is, that so far as the transmission or succession of the personal property of a deceased person is concerned, the right to the property is regulated by the law of the place of domicil of the deceased; but where there is a competition of diligence against a *chose in action* or other personal property, the right is regulated by the law of the place where the property is situated.

Even according to English law, if we allow the fact, and it cannot here be disputed, that the effect of the arrestment and intimation was the same as if an actual assignment had been made, and neither the assignees nor the shareholders in *Scotland* had notice of the prior assignment, the right of the *Australasian Investment Company* as assignees by virtue of the arrestment is prior: *Arden* v. *Arden* (6).

[They also argued that the debentures did not create a valid charge on the unpaid calls.]

Everitt, Q.C., and *Swinfen Eady*, for the English judgment creditors:—

The debentures give no charge on the unpaid calls. The *Australasian Investment Company* are according to English law here judgment creditors, and the English law is to prevail.

Cozens-Hardy, Q.C., and *Kenyon Parker*, for the English liquidator.

(1) Sects. 383, 387, 388.
(2) 1 H. Bl. 690.
(3) Ibid. 678.
(4) 1 Doug. 170.
(5) 4 T. R. 193, n.
(6) 29 Ch. D. 702, 708.

Buckley, in reply.

NORTH, J., decided that the debentures created a valid charge on the unpaid calls, and were therefore prior to the English judgment debts, and reserved judgment on the question whether the *Australasian Investment Company* or the *Union Bank of Australia* had priority.

1891. Jan. 14. NORTH, J. (after stating the facts as above, and reading parts of Mr. *Blair's* affidavit, continued):—

It is not satisfactory to me to find that the only evidence in this case of the Scotch law is contained in an affidavit by Mr. *Blair*, the legal adviser of the *Australasian Company*, and that, although there is no evidence contradicting it, the *Union Bank* state that they will, if necessary, contend before the House of Lords that such affidavit lays down the Scotch law incorrectly. This may be open before their Lordships on appeal, but it is not open before me, for the question of Scotch law is here merely a question of fact, upon which the evidence is all one way, and the *Union Bank* have not asked me to give them an opportunity of going into further evidence or to send a case for the opinion of the Scotch Court. By such evidence it is established that there is, by virtue of the arrestment, what is equivalent to an actual assignment of the calls in question duly intimated, and that this, by the law of *Scotland*, is preferable to and has priority over the assignment of the *Union Bank*, of which, though prior in time to the arrestment, no intimation had been given at the date when the assignment by arrestment became complete: and this is what I feel bound to decide.

It was contended on behalf of the *Union Bank* that the claim of the *Australasian Company* could only be valid as against "the sums attached," which was said to be what would remain of the calls after satisfying what was due to the *Union Bank*; but this is quite inconsistent with the language of the arrestment, which applies specifically to the whole sum due for calls from each of the shareholders on whom the arrestment was served. It was also said that after the assignment to the *Union Bank* all that the *Queensland Company* had left was the surplus remaining over

NORTH, J.
1891
In re QUEENSLAND MERCANTILE AND AGENCY COMPANY.
Ex parte AUSTRALASIAN INVESTMENT COMPANY.
Ex parte UNION BANK OF AUSTRALIA.

after paying the bank, that the rest of the calls belonged to the bank, and that it was contrary to principle and authority to hold that a process of law against the debtor could affect what was the property of the creditor, the *Union Bank*. But in the present case I have not to deal with a mere process of law, such as a judgment or garnishee order, but with what is established as a fact to be equivalent to an actual assignment, and which on the evidence I must treat in exactly the same way as if such an assignment had been actually executed and intimated.

But the *Union Bank* also put their claim to priority over the *Australasian Company* in another way. They say that whatever the position of matters might have been if all the parties to these transactions had been domiciled in *Scotland*, the facts are not so; that the *Queensland Company* were creditors in respect of the debt due from the shareholders for calls; that this company was domiciled in *Queensland*, and therefore the validity of the assignment by them to the *Union Bank* depends upon the law of *Queensland*, and not on the law of the Scotch debtor's residence; that by the law of *Queensland* (which is admitted to agree with that of *England*), no notice or intimation was necessary; and that a transfer of personal or moveable property, valid by the law of the owner's domicil, is valid wherever the property is situated. They rely on the principle concisely expressed in the maxim, *Mobilia sequuntur personam*, and more fully stated in numerous authorities, of which it is sufficient that I should refer to one, viz., the judgment of Lord *Loughborough* in *Sill* v. *Worswick* (1). He says this: "It is a clear proposition, not only of the law of *England*, but of every country in the world, where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession."

(1) 1 H. Bl. 690.

In my view, after full consideration, it is not necessary for me to express any opinion on this interesting and difficult question; for, assuming the principle above stated to include such a case as the present, there is another equally well-known rule of law, viz., that a transfer of moveable property, duly carried out according to the law of the place where the property is situated, is not rendered ineffectual by shewing that such transfer as carried out is not in accordance with what would be required by law in the country where its owner is domiciled. To give an instance. According to Scotch law it is necessary, in order to give a charge on corporeal moveables, that they should be delivered to and placed in the possession of the creditor. But, if a domiciled Scotchman resident in *London* gave a duly-registered bill of sale of the furniture of his house, that would be a complete and effectual transfer of the property without its being delivered to the creditor, notwithstanding that such a disposition of furniture in *Scotland* would have been ineffectual without delivery. To apply this to the present case, the *Queensland Company* did certain acts (by commission or omission), by virtue of which certain legal rights arose in *Scotland*, having identically the same effect in all respects (according to the evidence before me) as if the *Queensland Company* had on the date of the arrestment executed an assignment of the calls in question to the *Australasian Company*, and such assignment had been forthwith intimated to the persons in whose hands the calls were arrested. Such an assignment would, according to the evidence, clearly have been preferred to another assignment bearing, indeed, an earlier date, but not completed by intimation; and, in my opinion, the right of those who have acquired an unexceptionable title, and have recovered the property according to the law of the country where it is found and arrested, cannot be defeated by shewing that if the property had been elsewhere the title of the *Union Bank* might have been the preferable one. I speak of the *Australasian Company* as having recovered the calls, although they have, as matter of convenience, been received by the official liquidator, because they would have actually received them if the action had not been stayed, and the rights of the parties cannot be affected by the Court having stayed the action, as by the order staying the

NORTH, J.
1891
In re QUEENSLAND MERCANTILE AND AGENCY COMPANY.
Ex parte AUSTRALASIAN INVESTMENT COMPANY.
Ex parte UNION BANK OF AUSTRALIA.

action their right or security was expressly left unprejudiced. The terms of the order will require some care, in dealing with the figures; but in substance I accede to the summons of the *Australasian Company*, and only direct the payment of the balance of the Scotch calls to the *Union Bank*. There will be an order on both summonses, and the *Australasian Company* and *Union Bank* will add their costs to their respective securities. The official liquidator's costs must be retained by him out of the calls in his hands.

Solicitors for the *Union Bank of Australia: Murray, Hutchins & Stirling.*

Solicitors for the *Australasian Investment Company: Clarke, Rawlins & Co.*

Solicitors for the English Judgment Creditors: *Drake, Son, & Parton.*

Solicitors for the English Liquidators: *Flower & Nussey.*

D. P.

MOORE *v.* KNIGHT.

STIRLING, J.

1890

Nov. 18, 19; *Dec.* 18.

[1890 M. 1109.]

Partnership—Misrepresentation by a co-Partner—Concealed Fraud—Liability of Innocent Partner—Trustee and Cestui que Trust—Solicitor and Client—Statute of Limitations (21 *Jac.* 1, *c.* 16) [*Revised Ed. Statutes, vol. i., p.* 705] *—Trustee Act*, 1888 (51 *&* 52 *Vict. c.* 59), *s.* 8.

The decision in *Blair* v. *Bromley* (1) does not proceed on any principle or rule of equity specially applicable to trustees, but rests upon principles of the law relating to representation and partnership, and is unaffected by the 8th section of the *Trustee Act*, 1888.

Between the years 1867 and 1874 the Plaintiff deposited divers sums of money with Messrs. *M.*, *G.*, *& B.*, a firm of solicitors, for the purpose of investment. Representations were from time to time made to the Plaintiff, on behalf of the firm, that her money had been duly invested, and interest was paid to her by Messrs. *M.*, *G.*, *& B.* down to the death of *G.*, in 1877, and by the surviving members of the firm down to 1886. In 1886 it was discovered that the Plaintiff's moneys had never, except as to one small sum, been invested, but had, in fact, been embezzled by a clerk of the firm.

In an action brought by the Plaintiff, after the death of all the partners, for the recovery of her money, *G.'s* executors pleaded the *Statute of Limitations* and the *Trustee Act*, 1888, sect. 8; and contended that the Act of 1888 had rendered the decision in *Blair* v. *Bromley* no longer applicable:—

Held, that the decision in *Blair* v. *Bromley* was unaffected by the *Trustee Act*, 1888, and that the Plaintiff was entitled to be repaid the sums uninvested, with interest from 1886, out of the joint estate of the firm of *M.*, *G.*, *& B.*; and if such estate was not sufficient, then to recover the balance out of the separate estates of *M.*, *G.*, *& B.*

BETWEEN the years 1867 and 1874 the Plaintiff, *Sarah Moore*, deposited with a firm of solicitors, carrying on business at *Leicester*, the several sums of £150, £40, £45, £50, £43, and £23, amounting together to £351, for the purpose of investment; and upon each deposit she received a receipt in writing, signed on behalf of the firm, whereby the firm acknowledged that they had received the sum mentioned in the receipt for the purpose of investment.

During the above period, and for some time afterwards, the

(1) 2 Ph. 354; 5 Hare, 542.

STIRLING, J. 1890 MOORE v. KNIGHT.

firm consisted of *Thomas Miles*, *William Gregory*, and *James Bouskell*. *William Gregory* died on the 30th of April, 1877, and the Defendant *Knight* was his legal personal representative. In 1878 an action of *In re Gregory*, *Miles* v. *Knight* (1878, G. No. 10) was commenced by *Thomas Miles* against *Knight* and *James Bouskell* for the purpose of winding up the partnership affairs. In this action, which was still pending, a receiver had been appointed, and in his hands, or in Court, there were considerable assets of the partnership. *James Bouskell* died on the 4th of January, 1887. *Thomas Miles* was adjudicated a bankrupt in April, 1888, and he died early in 1890. Down to the death of *William Gregory*, interest at 5 per cent. was regularly paid by the firm to the Plaintiff, and, after his death, down to 1886, interest at the same rate was paid to her by the surviving partners.

On the 21st of April, 1890, the Plaintiff brought this action against *Knight*, *Rose Mary Bouskell*, the legal personal representative of *James Bouskell*, and *Palmer*, the trustee in bankruptcy of *Thomas Miles*, alleging that *Miles, Gregory, & Bouskell* had invested £50, part of the moneys so deposited with them by the Plaintiff, on a security called "*Frost's* security," but that they had converted the rest of such moneys to their own use, and claiming—(1.) A declaration that the Plaintiff was entitled to be paid out of the joint estate of the late firm of *Miles, Gregory, & Bouskell*, so far as the same would suffice, the amount of said several sums of £150, £40, £45, £50, £43, and £23, with interest thereon at the rate of £5 per cent. from 1886, and that the Plaintiff might be at liberty to carry in a claim for such amount in the action of *In re Gregory*, *Miles* v. *Knight* (1878, G. No. 10). (2.) A declaration that, if such joint estate was not sufficient to satisfy the Plaintiff's claim, she was entitled to recover the unsatisfied balance thereof out of the separate estates of *William Gregory*, *James Bouskell*, and *Thomas Miles* respectively, and that on the Defendants *Knight* and *R. M. Bouskell* respectively admitting assets, an order might be made against each of them for payment to the Plaintiff of such balance, or, in the alternative, that an order might be made for the administration of the respective estates of the said *William Gregory* and *James Bouskell*, and that

the Plaintiff might be at liberty to prove in the bankruptcy of *Thomas Miles* for the balance.

The Defendant, *R. M. Bouskell*, did not appear; and as against her the action came on upon motion for judgment. The Defendant *Palmer* appeared, and at the trial in substance supported the Plaintiff's case. The Defendant *Knight* alone really defended the action, and at the trial his counsel abandoned various defences which had been raised by the pleadings, and rested their defence on a plea of the *Statute of Limitations* (21 Jac. 1, c. 16), and the *Trustee Act*, 1888 (51 & 52 Vict. c. 59), s. 8 (1).

To this plea the Plaintiff replied as follows: "The said statute does not apply by reason of the moneys claimed being deposited upon an express trust between the Plaintiff as *cestui que trust*, and the said firm of *Miles, Gregory, & Bouskell*, as trustees; and further, that the claim is not barred by the said statute, or at all, by reason of concealed fraud, fraudulent misrepresentation, and fraudulent misappropriation of the trust funds, which the Plaintiff has only recently discovered, and particulars of which are as follows: The said moneys were deposited with the said firm of *Miles, Gregory, & Bouskell*, and the Plaintiff was informed from time to time by or on behalf of the same firm that the same had been duly invested, and accounts were from time to time rendered by the said firm to the Plaintiff, and interest paid to her thereon,

(1) In 51 & 52 Vict. c. 59, s. 8, clause 1 is, so far as material, as follows: "In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply: (*a*) All rights and privileges conferred by any *Statute of Limitations* shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him: (*b*.) If the action or other proceeding is brought to recover money or other property, and is one to which no existing *Statute of Limitations* applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall . . . not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession."

STIRLING, J. 1890 MOORE v. KNIGHT.

upon the pretence that such interest had accrued upon the investments of the said moneys; but, excepting the said '*Frost's* security,' the Plaintiff has not been able to discover, nor has she received any of the said alleged investments, or any of the said moneys so deposited as aforesaid, and with the exception of the said security no investment whatever was made."

It appeared from the evidence that the books of the firm had been very imperfectly kept; that the Plaintiff had from time to time received accounts made out on behalf of the firm (several of which accounts were put in evidence) of the interest due to her, in which, although no investment except that on *Frost's* security was specifically mentioned, the form of account adopted was such as in the judgment of the Court would naturally lead the person receiving the accounts to believe that the various principal sums mentioned in them had been duly invested; and the Court held that these accounts amounted to representations by the firm that investments had been duly made of the various sums deposited by the Plaintiff, and that by a continuance of such misrepresentations the Plaintiff was prevented from discovering the truth till 1886. There was no evidence, however, to shew that *William Gregory* was personally party or privy to any misappropriation of the Plaintiff's money, or to any of the misrepresentations made to her on the part of his firm; and it appeared that in 1886, one *Murdin*, who had been for many years managing clerk to the original firm and its successors, was arrested on a charge of embezzlement, and that facts were then discovered which tended to shew that he had embezzled not only the Plaintiff's money, but other moneys entrusted to the firm under similar circumstances. The further result of the evidence sufficiently appears in the judgment of the Court.

Ribton and *Bartley Denniss*, for the Plaintiff:—

The representations made by the firm as to the investment of the Plaintiff's money were representations made in the course of the partnership business, and as to matters within its limits. They amounted to a guarantee by the firm to the Plaintiff, and she is entitled to be put in the same position as if the facts represented had been true; and, therefore, even supposing that

William Gregory was personally ignorant of the whole transaction and derived no benefit from the fraud, still he is bound by and liable to make good the representations made to the Plaintiff: *Blair* v. *Bromley* (1). In that case it was also held under similar circumstances that in Equity the effect of the misrepresentation so far as regarded the *Statute of Limitations*, was the same as if it had been made on the day the fraud was discovered, notwithstanding that the partnership had been dissolved more than six years before. [Upon the *Statute of Limitations*, *Gibbs* v. *Guild* (2); *Metropolitan Bank* v. *Heiron* (3); and *Dooby* v. *Watson* (4), were also cited.]

Hastings, Q.C., and *Woodroffe*, for the Defendant *Knight*:—

All proceedings against *William Gregory* are barred by the *Statute of Limitations*.

By the 8th section of the *Trustee Act*, 1888, the *Statute of Limitations* may be pleaded by a trustee or person claiming through him in the same manner and to the same extent as if the person pleading it had not been a trustee, or a person claiming through a trustee, except in certain cases where there has been personal dishonesty in the trustee, or he has personally received and converted money to his own use. No case of personal fraud or receipt and conversion to his own use of the money is proved against *William Gregory*, and his case does not fall within any of the exceptions from the operation of the section. This change in the law has rendered the decision in *Blair* v. *Bromley* no longer applicable, and we are entitled to plead the *Statute of Limitations*.

[They also referred to *Watson* v. *Woodman* (5); *Manby* v. *Manby* (6).]

B. Fossett Lock, for the Defendant *Palmer*.

Ribton, in reply:—

This case falls within the exceptions from the operations of of the 8th section of the *Trustee Act*, 1888. The members of

(1) 2 Ph. 354; 5 Hare, 542.
(2) 9 Q. B. D. 59.
(3) 5 Ex. D. 319.
(4) 39 Ch. D. 178.
(5) Law Rep. 20 Eq. 721.
(6) 3 Ch. D. 101.

STIRLING, J. 1890 MOORE v. KNIGHT.

the firm were not only trustees, but co-partners, and as partners each of them was liable for the fraud of a servant of the firm, and each of them must be treated as privy to this fraud, which must be dealt with as a conversion of the Plaintiff's money to the use of the firm.

But, however this may be, it is not necessary for the Plaintiff to claim as *cestui que trust*. The interest account amounts to a representation by the firm that all the Plaintiff's money was invested. If that was a misrepresentation, then the case is brought within *Blair* v. *Bromley* (1), and the Plaintiff in fact claims as upon a breach of contract. The *Trustee Act* of 1888 does not touch *Blair* v. *Bromley*. That was not a case of trustee and *cestui que trust* at all, but a suit for breach of a common law contract brought in equity upon the ground of concealed fraud: *Gibbs* v. *Guild* (2) shews that it might equally have been brought at law.

The Plaintiff is entitled to have her claim satisfied out of the partnership assets of the original firm, and to a declaration that if the joint estate is not sufficient, the amount deficient must be made good out of the separate estates of the three partners, *Gregory*, *Bouskell*, and *Miles*: *In re Hodgson* (3); *Kewny* v. *Attrill* (4).

Dec. 18, 1890. STIRLING, J. (after stating the facts of the case, continued):—

In support of the Plaintiff's case, *Blair* v. *Bromley* was mainly relied on. For the Defendant *Knight*, it was hardly disputed that, but for the recent change introduced into the law by the *Trustee Act* of 1888, *Blair* v. *Bromley* would have applied; but it was said that this statute had rendered that decision no longer applicable, and that the present case did not fall within any of the exceptions in sect. 8, *i.e.*, "where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee or previously received by the trustee and converted to his use."

(1) 2 Ph. 354; 5 Hare, 542.
(2) 9 Q. B. D. 59.
(3) 31 Ch. D. 177.
(4) 34 Ch. D. 345.

To the argument based on the statute it was answered, first, that the case fell within the specified exceptions, and secondly, that even if the statute applied, a trustee was under it entitled to the benefit of the *Statute of Limitations* only in like manner, and to the same extent as a person not a trustee; that *Blair* v. *Bromley* (1) did not proceed on any principle or rule of equity specially applicable to trustees; and that the principle of that case remained unaffected by the statute.

I have not been able to satisfy myself that the present case, does not in truth fall within the last exception, namely, the case where the claim is "to recover trust property or the proceeds thereof . . . . previously received by the trustee and converted to his use." This section is to be read in connection with sub-sect. 4 of sect. 1, which enacts that, "The provisions of this Act relating to a trustee shall apply as well to several joint trustees as to a sole trustee." The case made by the Plaintiff is, that the money was received by the members of the firm as trustees for her, and, upon the evidence, it was in my opinion converted to the use of the firm on or shortly after the 31st of December, 1876. However, I think it unnecessary to express a final opinion on this, as in my judgment the second argument urged on behalf of the Plaintiff ought to prevail.

The material facts in *Blair* v. *Bromley* were that *William Bromley* and *Joseph Bromley* carried on business in partnership as solicitors. In 1829 *William Bromley* received from the plaintiffs a cheque for £4500 to be invested upon a specific mortgage then in contemplation; and the amount was received and placed to the account of Messrs. *Bromleys* with their bankers. The mortgage transaction was subsequently broken off, and the money was never invested. *William Bromley* concealed the fact from the plaintiffs, and rendered accounts from time to time in which he treated the £4500 as invested on the specific mortgage. In 1834 the partnership was dissolved. Interest was paid down to 1844, when *William Bromley* became bankrupt; and the plaintiffs then filed a bill against *Joseph Bromley*, the innocent partner, to recover the amount. The defendant pleaded the *Statute of Limitations*; but the plea failed. Now, the grounds

(1) 2 Ph. 354; 5 Hare, 542.

STIRLING, J. 1890 MOORE v. KNIGHT.

which are given by Lord *Cottenham* for deciding that the plea failed are these: He says (1): "In this case the payment of the £4500 into the funds of *William Bromley* and his partner, for the purpose of investment, is proved, and their liability admitted. Afterwards Mr. *Bromley*, one of the partners, representing that it had been invested, paid sums equal to the interest, and made a charge in a bill of costs for some of the expenses incident to such investment. Whether the defendant knew of the transaction or not, he certainly had the means of knowing it. But neither is necessary; for the duty of laying out the money was in the ordinary course of the business of the firm; and they had undertaken it; and in that case I agreed with what is laid down by the Master of the Rolls in *Sadler* v. *Lee* (2), that all the partners became liable for the several acts of each. In *Sadler* v. *Lee* the act consisted of abusing the power which the owner of the fund had conferred upon the several members of the firm by his power of attorney. In this case the act consists in representing that the £4500 had been invested on the security; but in *Bate* v. *Scales* (3), where a similar misrepresentation had been made by a trustee, who ought to have invested money in stock, Sir *William Grant* 'considered the case of a representation that the stock did exist, as precisely a parallel case to the actual existence of the fund in stock upon that day, which stock was sold out.' In the present case, the misrepresentation continued until the fraud was discovered: the case therefore, according to Sir *William Grant*, is the same as if on that day the fund, having been previously invested, had been called in and received by Messrs. *Bromley*, in which case there could not have been any question as to the *Statute of Limitations*. Those who, having a duty to perform, represent to those who are interested in the performance of it that it has been performed, make themselves responsible for all the consequences of the non-performance." Then, after referring to some cases, his Lordship proceeds: "What, then, is the nature of the liability which so arises from the misrepresentation? Merely a guarantee that the parties whose interest might be affected by the misrepresentation shall be placed in the same

(1) 2 Ph. 359. (2) 6 Beav. 330.
(3) 12 Ves. 402.

situation as if the facts represented were true. The misrepresentation was probably made for a fraudulent purpose; but the consequence is a merely civil liability; and as one partner may certainly bind another as to any matter within the limits of their joint business, so he may by an act which, though not constituting a contract by itself, is in equity considered as having all the consequences of one. I am, therefore, of opinion that *William Bromley's* partner, though he had no knowledge, or means of knowledge, of the misrepresentation, would have been affected by this equity arising from it, and that time did not begin to run against the plaintiffs' right until the discovery of the fraud."

It appears, therefore, that the money came into the hands of the firm of Messrs. *Bromley* without fraud and that one of the firm afterwards committed a fraud in respect of it, but made misrepresentations (some of which were attributable to the firm) which prevented the fraud from being discovered until the period fixed by the *Statute of Limitations* had expired. It was held that the innocent partner was deprived of the benefit of the statute by those representations which bound him as a partner. The decision rests on principles of the law relating to representation and to partnership, not on those which relate to trusts; and in my opinion those principles are unaffected by the provisions of the *Trustee Act*, 1888.

Here the money of the Plaintiff came without fraud into the hands of the firm for investment. No investment was made, but the money was by some act, of which I am willing to believe that *William Gregory* was innocent, misappropriated and applied to the purposes of the firm.

In 1876, before the death of *Gregory*, an account was rendered by the firm which contained misrepresentations as regards all the sums except that invested on *Frost's* security, and by a continuance of such misrepresentations the Plaintiff was prevented from discovering the truth until 1886. The principles laid down by *Blair* v. *Bromley* (1) appear to me therefore to apply.

It may be right to say that if reliance be placed on subsect. 1 (*b*) of sect. 8 of the Act of 1888, which provides that the

(1) 2 Ph. 354; 5 Hare, 542.

STIRLING, J. 1890 MOORE v. KNIGHT.

trustee "be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action for debt for money had and received," then the case of *Gibbs* v. *Guild* (1), before the Court of Appeal, shews that by a proper form of pleading the benefit of the decision in *Blair* v. *Bromley* (2) (which is recognised by the Court of Appeal in that very case) may be obtained by the Plaintiff.

As regards *Frost's* security, it appears to have consisted of a conditional surrender by one *Samuel Frost* to the Plaintiff of certain copyhold property held of a manor to which *Thomas Miles* was steward. This conditional surrender was not entered on the Court Rolls, and contained, when handed to the Plaintiff, a memorandum endorsed thereon in the following terms, "paid off 2nd April, 1885." But the Plaintiff never received the money, nor knew that it had been paid off. She compromised her claim against the owner of the property subject to the surrender for £25. There is no evidence to shew that *William Gregory* is in any way responsible in respect of this investment, and I do not see how any claim in respect of it can be made against the joint assets of the partnership or the separate estate of *William Gregory*.

The action is brought in respect of £351, including the £50 which was advanced on *Frost's* security; and it appears to me that under those circumstances the Plaintiff is entitled to relief against the assets of the firm and the estate of *William Gregory* in respect of £301.

As to the nature of the relief, first the Plaintiff is entitled to be paid the amount of her claim out of the partnership assets of the firm of *Miles, Gregory, & Bouskell.* These assets are in the control of the Court in the action of *In re Gregory, Miles* v. *Knight*, and the simplest mode of making them available for the Plaintiff's benefit appears to be to give her leave to make such application as she may be advised in that action.

The Plaintiff is also entitled to a declaration that if the joint estate is not sufficient to satisfy her claim, she is entitled to recover the balance out of the separate estates of *William Gregory*, *James Bouskell*, and *Thomas Miles*.

(1) 8 Q. B. D. 296; 9 Q. B. D. 59. (2) 2 Ph. 354; 5 Hare, 542.

As regards the estate of *William Gregory*, it appears that, on the 8th of December, 1877, judgment was given for the administration of it in an action of *In re Gregory, Astley* v. *Knight*, which was brought by one of the next-of-kin of *William Gregory*. The Plaintiff did not prove her debt in that action, and the assets which were not administered by the Court therein were paid to the Defendant *Knight* on his undertaking duly to administer them. How those assets have been disposed of does not appear; but the Defendant *Knight*, who does not admit assets in satisfaction of the Plaintiff's claim, does not object to have an order in this action for the appropriate accounts and inquiries, and this is the only relief which I can give her as against the estate of this Defendant.

The Defendant, *Rose Mary Bouskell*, does not appear; and as against her the Plaintiff would seem entitled to an administration judgment according to the form given in *Hills* v. *M'Rae* (1), being the usual judgment in respect of a partnership debt as against the separate estate of a deceased partner, which was followed by *In re Hodgson* (2). The proof of the Plaintiff against the estate of *Thomas Miles* has been admitted by the Defendant *Palmer*; consequently no further relief is required as against him.

In my opinion the Plaintiff is entitled to costs against the Defendant *Gregory Knight*, who has set up a defence which has failed.

Solicitors: *H. H. Hood Barrs*; *Robinson, Preston, & Stow*, agents for *Berridge & Miles, Leicester*.

(1) 9 Hare, 297.

(2) 31 Ch. D. 177.

W. W. K.

KEKEWICH, J.

1890

Dec. 12, 16, 17.

In re WHITELEY AND ROBERTS' ARBITRATION.

Practice—Arbitration—Award—Arbitrator—Misconduct—Setting aside Award—Motion — Oral Evidence — Admission by Arbitrator to one Party—Evidence.

Evidence of an admission out of Court by an arbitrator, that he made his award improperly—as, for example, by collusion or in consequence of a bribe—is not admissible in support of an application to set aside the award.

Earl v. *Stocker* (1), *Morgan* v. *Mather* (2), and *Mills* v. *Master, &c., of Society of Bowyers* (3), considered.

MOTION to set aside an award.

For some time previous to October, 1890, *Nathan Whiteley*, a woollen manufacturer, at *Golcar*, *Yorkshire*, and a man of means, had been in the habit of lending money to a man named *Squire Roberts*, a cardmaker at *Cleckheaton*, in the same county, upon I. O. U.'s or promissory notes, or other security.

Disputes having arisen as to the precise amount due from *Roberts* to *Whiteley*, they, on the 7th of October, 1890, entered into an agreement in writing to submit their differences to the arbitration of one *Rawdon Clough*, who, it was agreed, should exercise all the powers conferred by the *Arbitration Act*, 1889; and it was also agreed that that Act should apply to the submission.

Rawdon Clough was a book-keeper at *Golcar*, and employed in that capacity by *Whiteley*; and he was also on friendly terms with *Roberts*, who, it was said, himself suggested that *Clough* should be the arbitrator.

The parties, or one of them (the evidence not being quite clear on this point), attended before the arbitrator, who, on the 13th of October, 1890, made his award, finding £386 16*s.* as the sum due from *Roberts* to *Whiteley*.

Whiteley was much dissatisfied with the award, and, having found reason to suspect that there had been some collusion between *Roberts* and *Clough*, he, on the 25th of October, 1890, commenced an action against *Roberts* for the purpose of, amongst

(1) 2 Vern. 251. (2) 2 Ves. 15.

(3) 3 K. & J. 66.

other things, having the award set aside on the ground of its having been improperly procured.

On the 4th of November, 1890, *Whiteley* served *Roberts* and *Clough* with a notice of motion entitled in the matter of the arbitration and of the *Arbitration Act*, 1889, asking that the award might be set aside on the ground that *Clough* had misconducted himself in the arbitration by acting therein in collusion with *Roberts*, and by accepting or agreeing to accept moneys from *Roberts*, or from some other person or persons paying or agreeing to pay moneys on his behalf, as an inducement to fraudulently make the award in favour of *Roberts* and against the interests of *Whiteley*, and also by wilfully destroying or concealing a cash book belonging to *Whiteley* and entrusted by him to *Clough* for the purpose of enabling him to make the award; and also upon the ground that the award had been improperly procured through *Clough's* fraudulent conduct. The motion was made under sect. 11, sub-sect. 2, of the *Arbitration Act*, 1889, which provides that "where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside."

The motion was brought on before Mr. Justice *Kay* upon the 7th of November, 1890, a motion day, affidavits having been filed on both sides; but, as the case appeared to be one that should more properly be heard on oral evidence, his Lordship directed it to be set down in the witness list for that purpose; and it was accordingly so heard before Mr. Justice *Kekewich* on the 12th, 13th, 14th, and 17th of December, 1890, Mr. Justice *Kay* having in the meantime been appointed Lord Justice of Appeal.

The motion having been opened, *Whiteley* was put into the box and examined and cross-examined. In support of his charge against *Clough* of fraudulent conduct, he, in the course of his evidence, stated to the following effect. He said that late in the evening of the 23rd of October, 1890,—that is, subsequently to the date of the award—he and *Clough* walked up together from a club, at which they had just met casually, to "*Sunnybank*," the house occupied by *Whiteley* and his father and brothers, and near to which *Clough* himself lived. Seeing a light in the stable at the back of the house (where two of *Whiteley's* brothers and

KEKEWICH, J.

1890

In re WHITELEY AND ROBERTS' ARBITRATION.

another man happened to be working), they (*Whiteley* and *Clough*) entered the stable and remained there a few minutes. On leaving the stable they stood conversing in a loud tone of voice for a few minutes just outside the stable door. In the course of this conversation *Whiteley* asked *Clough* (who had, on the 18th of December, left or been discharged from *Whiteley's* employment) when he was coming to finish up the books. *Clough* replied he was coming the following day. *Whiteley* then said that he (*Clough*) had lost a good situation and did not deserve to get another; to which *Clough* rejoined, "I don't care a d—— for a situation: it is every man for himself. I have got as much out of the job as will keep me for twelve months, and when that is done I can begin working again." *Whiteley* then asked *Clough* to give him back his cash book; to which *Clough* replied in strong and insulting language to the effect that the book had been destroyed or had disappeared. Persons who were in the stable and overheard the above conversation gave evidence in corroboration of *Whiteley's* story. This concluded *Whiteley's* case, *Clough* not being called in support of it.

Renshaw, Q.C., and *Waggett*, for *Whiteley*, submitted that the evidence had established an admission by *Clough* that he had been bribed by or had acted in collusion with *Roberts*, and that therefore the award ought to be set aside.

Warmington, Q.C., and *Dare*, for *Roberts*, said that they were prepared to prove that the charge against *Roberts* and *Clough* of bribery or collusion was wholly unfounded; but they raised the preliminary objection, as a point of law, that *Clough's* admission, even if true, could not be used against *Roberts*, who was not present when the so-called "admission" was made. The grounds alleged in the notice of motion for setting aside the award must be strictly proved by evidence outside any admission by the arbitrator. The moment an arbitrator has made his award his duty has come to an end; he has no authority to say anything as to his award, and if he does so he may be restrained. And further, he cannot be required to give evidence as to the reasons of his award, or as to anything he did in the arbitration.

[KEKEWICH, J.:—No evidence is admissible as to the intention and state of mind of the arbitrator when he made his award: *Duke of Buccleuch* v. *Metropolitan Board of Works* (1).]

That is so; it is against the settled practice to say that the arbitrator after having made his award can set it aside by statements of his own. There is no authority that, as a matter of evidence, an admission by an arbitrator, made after his award is published, and therefore after his duties as arbitrator have ended, can be used in evidence against a party to the arbitration. The arbitrator cannot be called to establish such an admission as evidence. If the point of law we now raise is decided in our favour, then the applicant's case falls to the ground and it becomes unnecessary for us to call our witnesses.

Renshaw, Q.C., and *Waggett*, for *Whiteley*, upon the preliminary objection:—

We submit that the admission by the arbitrator may be used on an application to set aside his award. Take the case of such an application being made on the ground of mistake: it is essential that the Court should have before it the admission of the arbitrator that he has in fact made a mistake; and when the arbitrator has admitted the mistake, the Court will go behind the award: *Mills* v. *Master, &c., of Society of Bowyers* (2). The admission may be made by affidavit, and that affidavit may be used by the one party to the arbitration against the other (3). So formerly the arbitrator might have made his admission by his answer: *Earl* v. *Stocker* (4). Again, in *Morgan* v. *Mather* (5), the Court proceeded entirely on the arbitrator's admission. If the arbitrator has gone so far wrong as to justify the interference of the Court, any admission by him will suffice, because a Court of Equity will not allow one party to profit by a mistake. This is an exception to the ordinary rule of law that an admission made to one party in the absence of the other cannot be used against that other. Here is the case of a person acting in a semi-judicial capacity admitting he has done an unjust act—has

(1) Law Rep. 5 H. L. 418.
(2) 3 K. & J. 66, 73.
(3) 3 K. & J. 66, 73.
(4) 2 Vern. 251.
(5) 2 Ves. 15, 17, 18.

KEKEWICH, J. 1890 *In re* WHITELEY AND ROBERTS' ARBITRATION.

received a bribe. If he admits that, then it follows that in a Court of Equity all the proceedings tainted by his misconduct ought to be set aside. We cannot be expected to call *Clough* on our behalf to prove his own dishonesty. Unless the evidence of the person to whom he made the admission is accepted, it is difficult to see how the truth is to be arrived at.

Warmington, in reply:—

With regard to the authorities, the admission by the arbitrator, to be evidence, must be made in Court, not out of Court. An admission when made in Court is an admission to the Court itself. If it is made outside and not denied by the arbitrator, and if it is then incorporated in an affidavit by the arbitrator, there again the admission contained in that affidavit may be used. In the cases cited the admission was on the record and not outside the proceedings, and was thus an admission to the Court itself.

J. G. Butcher, for *Clough*.

KEKEWICH, J.:—

It is somewhat strange that, notwithstanding the industry of counsel, no case has been found bearing more directly on this point than those that have been called to my attention, because the matter is one of great importance, and must, I should think, have received the consideration of the profession before now.

Now, it is desirable to see exactly how the question arises. The applicant, Mr. *Whiteley*, alleges that the arbitrator between him and Mr. *Roberts* arrived at an unjust conclusion because he, the arbitrator, Mr. *Clough*, was bribed by Mr. *Roberts*. In support of that, he brings forward a variety of surrounding circumstances which are intended to raise the probability that such a thing took place, or, at any rate, to shew that it is consistent with the rest of the facts that such a thing took place. But his only piece of direct evidence, or what he tenders as direct evidence, is this: he calls several witnesses to prove that on a certain occasion, the 23rd of October, 1890, the arbitrator expressed himself in language which, when fairly interpreted, could only

mean that he had been bribed by *Roberts*. I have not heard the argument on behalf of *Roberts* or *Clough* respecting the meaning of those words, and it is not necessary at present for me to express any opinion upon the fair construction to be put upon them, nor would it be convenient for me now to criticise the evidence of witnesses who swore to that conversation. I therefore assume that those witnesses are truly stating what occurred, and that what occurred was, when properly construed, an admission by Mr. *Clough* that he had been bribed by Mr. *Roberts*; from which, of course, the conclusion would follow that the award was corrupt.

The question is, Is that admission by *Clough* (assuming it to have been such as I have mentioned) sufficient, without anything else, to require Mr. *Roberts* to answer Mr. *Whiteley's* charge? Is there, so to speak, any evidence to go to the jury? As a rule, the admission of any one party, though it can be produced in evidence against himself, cannot be adduced in evidence against any other party. That stands upon common sense as well as legal principle. There are well-known and recognised exceptions to that rule, but I believe they may be classed under two heads. One of them is, when the party against whom the admission is sought to be read has a joint interest with the party making the admission in the subject-matter—in the thing to which the admission relates. That, of course, depends upon the legal principle that persons seized jointly are seized of the whole: each being seized of the whole, the admission of either is the admission of the other, and may be produced in evidence against that other. That is applied from real property law to other matters. The other exception is, where the party against whom the admission is sought to be used takes what he claims in the subject-matter from the person who made the admission; as in the case suggested by Mr. *Renshaw*, where it is sought to read against the heir an admission made by the ancestor. He stands in the shoes of the party making the admission. He can only claim what he claims because he derives title in that way; and therefore it is only fair, according to legal principles, that he should be bound by the admission of him through whom he claims.

KEKEWICH, J. 1890 *In re* WHITELEY AND ROBERTS' ARBITRATION.

With those two exceptions, so far as I am aware, the rule is absolute—that an admission can only be read against the party making it. Why should an admission by an arbitrator form another exception to the rule? One must regard the great danger of introducing such an exception. If the argument on behalf of Mr. *Whiteley* is to be allowed to the full extent, any person in the position of arbitrator or umpire, might, not only immediately after, but almost at any time after, the award state some reason or other—either that he had been bribed, or otherwise—as shewing that the award was bad; and at once the person against whom that award had gone might take proceedings to set it aside. Proceedings of that kind are guided by rules, and can only be taken within a short period; but the Court has authority to extend the period; and, supposing the admission of the arbitrator could be received in evidence, it would be extremely difficult to resist an extension of time if the admission were of an extremely gross character; so that one would be introducing uncertainty into a branch of the law in which the Legislature and the Courts have done their best for many years to establish certainty.

Now, is there any authority for this exception? Two or three cases have been cited, and they certainly, neither of them, go directly to the point. I find it difficult to extract any principle from them. The case which has the most direct bearing is that of *Mills* v. *Master, &c., of the Society of Bowyers* (1). There, no doubt, Vice-Chancellor *Wood* laid great importance on the admission by the arbitrators. There was a mistake, and he pointed out that the admission was absolutely necessary. He refers (2) to two cases, *In re Robson and Railston* (3) and *Hutchinson* v. *Shepperton* (4), and says that there "the arbitrators admitting, by affidavit, the mistake they had made, the Court thought itself at liberty, notwithstanding some very strong *dicta* to the contrary in some cases before the Exchequer, to send the matter for the reconsideration of the arbitrator, or to set the award aside." And partly with reference to those cases, and partly on general rules, he thought you must have the admission of the arbi-

(1) 3 K. & J. 66.
(2) Ibid. 73.
(3) 1 B. & Ad. 723.
(4) 13 Q. B. 955.

trators. I am bound, in construing the Vice-Chancellor's judgment, especially in a matter where I am rather wanting authority elsewhere, to turn to the special facts, and see what is the meaning of his judgment. In that case there was a contest between the parties whether the award had proceeded on a proper basis; and it appears from the statement in the report (1) that "affidavits were filed on both sides, shewing the principle on which the valuations"—they were valuations rather than awards there—"had been made. It is sufficient for the present purpose to state, that the grounds of *Mills'* objection were, first, that the umpire had improperly held communications with some of the agents of the company." Then, in addition to these affidavits, as I understand it, the umpire himself makes an affidavit. I certainly understand from the report that the affidavit of the umpire was in addition to the other affidavits which contained conflicting evidence. The Vice-Chancellor refers to that affidavit as containing the admission on which he relies.

Having regard to general principles and the other authorities, I do not think I ought to consider the Vice-Chancellor's decision as an authority that I can set aside this award on the admission of the arbitrator; it does not go further than this; that even though the impropriety is proved, or ought to be concluded from the other evidence, yet the award cannot be set aside without the admission of the arbitrator.

Two other cases have been cited which, there being such paucity of authority, I ought to notice. One is the old case of *Earl* v. *Stocker* (2), which I have some little difficulty in understanding, because the report does not state all the facts, pleadings, and so forth; but I think one must assume that, in some way or other, the admission of the arbitrators must have been a matter of record, so that the Court had an admission made to itself. The arbitrators there certainly did make the admission by their answer; but, as was pointed out by Mr. *Renshaw*, that answer could only be read against the arbitrators themselves. I think, however, that in some way or other it must have been read against the other parties. How that was done, I cannot find from the report, and therefore I do not think I can take that

(1) 3 K. & J. 67. (2) 2 Vern. 251.

KEKEWICH, J. 1890 *In re* WHITELEY AND ROBERTS' ARBITRATION.

case, standing alone, as an authority. No other case has been cited as laying down the law that, if the arbitrators confess, even by an answer, that they have made an award through improper motives, that admission is sufficient, without more, to operate against the award so as to enable the Court to set it aside.

The only other case is *Morgan* v. *Mather* (1), where Lord Commissioner *Wilson* says the only grounds for setting aside an award are, "first, that the arbitrators have awarded what was out of their power." That you have to prove in the ordinary course. He states that as one ground for setting aside an award, and one which, of course, will have to be proved by evidence. Then he goes on: "Secondly, corruption, or that they have proceeded contrary to the principles of natural justice; though there is no corruption, as if without reason they will not hear a witness." That is again a matter which you have to prove. "Thirdly, that they have proceeded upon mere mistake, which they themselves admit," as in the case before Vice-Chancellor *Wood*, of *Mills* v. *Master, &c., of the Society of Bowyers* (2). That expresses agreement with what the Vice-Chancellor says, that where you are proceeding on a mistake, you must not be content with conflicting evidence that there was a mistake, but you must have the admission of the arbitrators. When it is put in that way, one sees exactly why the admission of the arbitrators is of importance in a matter of mistake. How could the Court adjudicate on conflicting evidence of a mistake made by the arbitrator? The mistake is in his own mind; and if the arbitrator does not admit that he has made a mistake, surely the duty of the Court would be to reject the conflicting evidence, and hold that, without the admission, there was no proof of mistake at all. So that *Morgan* v. *Mather* appears to me, particularly when read with Vice-Chancellor *Wood's* decision, to shew what the value of admission is, and why admission in such a case is so particularly required.

It was argued that the arbitrator cannot give evidence. That question was considered in the case of the *Duke of Buccleuch* v. *Metropolitan Board of Works* (3). It was there argued at con-

(1) 2 Ves. 15, 18. (2) 3 K. & J. 66.
(3) Law Rep. 5 H. L. 418.

siderable length, the Judges were summoned, and the matter was gone into fully. Lord *Cairns* seems to me to sum up the law exactly. He says (1): "It appears to me that upon every point which may be considered to be a matter of fact with reference to the making of the award, the evidence of the arbitrator or umpire was properly admissible. He was properly asked what had been the course which the argument before him had taken—what claims were made and what claims were admitted; so that we might be put in possession of the history of the litigation before the umpire up to the time when he proceeded to make his award. But there it appears to me the right of asking questions of the umpire ceased." That I understand to mean that if you desire to prove that circumstances were brought before the umpire which ought not to have been brought before him, and matters of that kind, you may call the umpire and have the history of the litigation before him proved in the ordinary way by his evidence, he being the person best qualified to give it. He is a witness for that purpose; but, beyond that, you must not question him—you must not examine him as to the award. That does not exclude his evidence in a case like this, because here it is not a question of litigation before the umpire—it is not a question of what occurred in reference to the award, or to the arbitration under which the award is founded; but the question is as to what took place before the award. The question is whether the arbitrator was bribed. Mr. *Whiteley* can, if so advised, call him to prove that, and no possible objection could be taken to his evidence on either side. That seems to me to shew that, though there may be some difficulty in proving such a fact as this, there is no legal difficulty; and that, again, is a reason, it seems to me, why one should rely upon the ordinary rules, and say that, if a man comes here to establish a case founded on an allegation of fraud, he must prove that fraud, otherwise his case fails.

The point is a new one in the sense of there being no authority that I can find, or that counsel can find; but, on principle and such authority as there is, I think the objection a good one, and that proof by the evidence of others of an admission by the

(1) Law Rep. 5 H. L. 462.

KEKEWICH, J. 1890 *In re* WHITELEY AND ROBERTS' ARBITRATION.

arbitrator is not sufficient to prove misconduct or fraud on his part; and that being so, the motion fails as against *Roberts*.

Renshaw said he did not propose to go on with the case against *Clough*.

The motion was accordingly dismissed with costs as against both Respondents.

Solicitors: *Van Sandaus*, agents for *E. F. Brook, Huddersfield; Torr & Co.*, agents for *Douthwaite & Waddington, Cleckheaton; Yewdall, Son, & Marriott*, agents for *J. V. Curry, Bradford*.

G. I. F. C.

KEKEWICH, J. 1891 *Feb.* 12.

ASHLING *v.* BOON.

[1889 A. 809.]

Evidence—Admissibility—Promissory Note insufficiently Stamped—Stamp Act, 1870 (33 & 34 *Vict. c.* 97), *s.* 54 [*Revised Ed. Statutes, vol. xvi., p.* 499].

A promissory note insufficiently stamped cannot be admitted in evidence to prove the receipt of the money for which the note was given.

Green v. *Davies* (1) followed.

Evans v. *Prothero* (2) distinguished.

THE Plaintiffs in this action claimed to be entitled as the heir-at-law and customary co-heirs of an intestate to freehold and copyhold lands which belonged to the intestate, and of which the Defendant, *W. D. Boon*, was in possession. As to part of the lands, it was admitted that they were subject to a mortgage for £550, which was vested in the Defendant, and the Plaintiffs claimed to be entitled to redeem this part of the lands, and to recover the rest.

The Defendant, by counter-claim, alleged that he was entitled to an equitable mortgage of the rest of the lands by deposit of title-deeds, for sums amounting in all to £340 advanced by him to the intestate and her deceased husband, under whom she derived title.

The Defendant was called as a witness in support of the

(1) 4 B. & C. 235. (2) 1 D. M. & G. 572.

counter-claim, and, upon his examination-in-chief as to a sum of £40, which he stated he had advanced to *James Donaldson*, the husband of the intestate, there was tendered in evidence a document worded at follows: "On demand I promise to pay to *W. D. Boon* the sum of forty pounds for value received after the rate of four pounds and ten shillings per cent. per annum. *King's Lynn*, April 30, 1878. *James Donaldson*." On inspection, this document was found to bear only a 1*d.* receipt stamp.

Renshaw, Q.C. (*E. Bray*, with him), for the Plaintiffs, objected that the document, not being stamped as a promissory note, was inadmissible in evidence.

Marten, Q.C. (*C. E. E. Jenkins*, with him), for the Defendant:—

As the document bears a penny stamp, we are entitled to put it in as a receipt for the money: *Evans* v. *Prothero* (1).

Renshaw:—*Evans* v. *Prothero* was an entirely different case. A promissory note stands on a peculiar footing, and cannot be put in for any purpose whatever unless it is properly stamped.

[KEKEWICH, J., referred to *Ionides* v. *Pacific Fire and Marine Insurance Company* (2).]

The question depends on the *Stamp Act*, 1870, sects. 45–55. It is not disputed that this document is a promissory note within the definition in sect. 49. Sect. 54 provides that "the person who takes or receives from any other person any such . . . note not being duly stamped, either in payment or as a security, or by purchase or otherwise, shall not be entitled to recover thereon, or to make the same available for any purpose whatever."

[KEKEWICH, J., referred to *Tilsley* on Stamps (3) and *Gregory* v. *Fraser* (4).]

That case is in our favour. Lord *Ellenborough* intimated that the promissory note there in question being unstamped, would not be admissible "to prove the loan of the money." It was admitted to shew that the maker of the note was drunk when he wrote it. That was for a purpose purely collateral, and it is only

(1) 1 D. M. & G. 572.
(2) Law Rep. 6 Q. B. 674.
(3) 3rd Ed. p. 252.
(4) 3 Camp. 454.

KEKEWICH, J. 1891 ASHLING v. BOON.

documents can be admitted: *Roscoe's* Nisi Prius Evidence (1). The receipt of the money secured by a promissory note, is not matter collateral, but of the very essence of the note itself. In *Green* v. *Davies* (2), decided under a statute substantially in the same language as sect. 54 of the *Stamp Act*, 1870, it was held that a promissory note insufficiently stamped was inadmissible as evidence of an account stated. That is an authority precisely in point.

Marten, in reply:—

The cases cited were all prior to *Evans* v. *Prothero* (3), and were overruled by that decision, which has always been regarded as settling the law on the subject. There a document, which was inadmissible in evidence as a receipt because unstamped, was nevertheless admitted as evidence of a contract. Lord *St. Leonards* (4) said that he entertained no doubt, with all deference to the opinions which had been attributed to the learned Judges before whom the case had already come, that the document was receivable as evidence of an agreement, though, by reason of the fiscal regulations of the country, not as a receipt. The language of the *Stamp Act*, 1870, cannot be regarded as conclusive. The question is in what way the words of the statute are to be applied. In construing a statute, the intention of the Legislature is to be regarded: *Cox* v. *Hakes* (5); *In re Standard Manufacturing Company, Ex parte Lowe* (6); and there is no indication in the Act of any intention to alter the existing law. In *Sutton* v. *Toomer* (7) a promissory note, inadmissible as such, was admitted as evidence of the terms on which a deposit was made. *Ionides* v. *Pacific Fire and Marine Insurance Company* (8), which was decided subsequently to the *Stamp Act*, 1870, applied the principle of *Evans* v. *Prothero* to the case of an underwriter's slip, which was admitted in evidence, notwithstanding the stringent language of the statute 30 Vict. c. 23, ss. 7, 9. If a stamped receipt and un-

(1) 15th Ed., pp. 211, 558.
(2) 4 B. & C. 235.
(3) 1 D. M. & G. 572.
(4) Ibid. 575.
(5) 15 App. Cas. 506, 518.
(6) Unreported.
(7) 7 B. & C. 416.
(8) Law Rep. 6 Q. B. 674.

stamped promissory note were written on the same piece of paper, it is clear that one might be used in evidence, though the other could not. Why should not an instrument properly stamped as a receipt be put in and read as such, notwithstanding that it contains words which constitute it also a promissory note?

KEKEWICH, J.:—

The Defendant says he has from time to time advanced to *James Donaldson* certain moneys making up a total specified amount, and that the first advance was £40. In proof of that he tenders a document which expresses on the face of it that £40 was received by *James Donaldson* from the Defendant on or before the 30th of April, 1878. The admission of the document in evidence is objected to on the part of the Plaintiffs on the ground that it is a promissory note for the sum of £40, and being stamped only with a penny receipt stamp is insufficiently stamped, and cannot be received in evidence. That it is a promissory note, and that it is insufficiently stamped as such, cannot be questioned. The Defendant urges me to admit it on the ground that according to the decision of Lord *St. Leonards* in *Evans* v. *Prothero* (1) the document, though not admissible as a promissory note, is admissible for some other purposes, and that the present purpose is within that exception. The words of the statute—the *Stamp Act*, 1870—are stringent. Every bill of exchange or promissory note must be stamped before issue, and if it is not a person who takes or receives from any other person any such bill or note not being duly stamped is not to be entitled to recover thereon, or to make the same available for any purpose whatever. From that it would certainly appear that a promissory note cannot be used for any purpose, whether to sue on the note or otherwise, unless it is sufficiently stamped, and that seems to have been the view taken by the Court in *Green* v. *Davies* (2), where the statute under which that case was decided is set out in the report. That statute was expressed in terms as stringent as those of the *Stamp Act*, 1870, and in that case a promissory note insufficiently stamped was tendered as evidence of an account stated, and the Court declined to admit it.

(1) 1 D. M. & G. 573. (2) 4 B. & C. 235.

KEKEWICH, J.
1891
ASHLING v. BOON.

Bayley, J., by whom the considered judgment of the Court was delivered, said (1): "We therefore feel ourselves bound, though reluctantly, to say that the stamps in this case were not sufficient"—there was a question there whether the document was sufficiently stamped—"and if not, it follows as a consequence upon the third point, that the note could not be received as evidence of an account stated"; and then he quotes the statute, 31 Geo. 3, c. 25, which says that no note shall be given in evidence or available in law or equity unless the paper on which it is written is duly stamped. There, under a statute practically the same as the *Stamp Act*, 1870, I have a distinct decision that a promissory note insufficiently stamped cannot be admitted as evidence of an account stated, and if so, it follows as a matter of course that it cannot be put in evidence as a receipt for the money. The case of *Gregory* v. *Fraser* (2) was cited in argument, and I do not wish to pass it over, because, though the statute is not set out there, and may have been entirely different from that governing the present case, still the decision is that of Lord *Ellenborough*, and his decisions, though at Nisi Prius, have always been regarded as of very great importance. There the note attempted to be put in was unstamped; the object of putting it in was to prove that it was obtained from the promisor when he was drunk, and Lord *Ellenborough* said it certainly could not be received in evidence "as a security, or to prove the loan of the money," that is to say, to prove that the money was paid, but it might be looked at as a contemporary writing for the collateral purpose of shewing that the man was drunk, and he let it go to the jury on that point. In *Sutton* v. *Toomer* (3) the promissory note which was admitted in evidence was objected to, not because it was unstamped, but because it had been altered and so had become void, and that, I think, takes that case out of the present discussion, because here the objection is that the promissory note is inadmissible for want of a proper stamp. The argument on behalf of the Defendant really goes on this that all the decisions referred to on the part of the Plaintiff were previous to the case of *Evans* v. *Prothero* (4) in which Lord *St. Leonards* laid down a

(1) 4 B. & C. 242.
(2) 3 Camp. 454.
(3) 7 B. & C. 416.
(4) 1 D. M. & G. 572.

different rule, and that *Evans* v. *Prothero* (1) must be accepted as the governing decision. I am not aware that the decision in *Evans* v. *Prothero* has ever been departed from. In that case a document was put in which could not be admissible as a receipt, because it was insufficiently stamped in that character, but it contained all the requisites to constitute it valid evidence of a contract, and was in fact a contract in writing, and Lord *St. Leonards* admitted it as evidence of a contract, although it could not be read as evidence of a receipt, and he states the law on the subject thus (2): "The document in question was receivable as evidence of an agreement, though by reason of the fiscal regulations of the country, not as evidence of a receipt." One answer to the argument founded on that case is that Lord *St. Leonards* was there dealing not with a promissory note or bill of exchange, but with a document of an entirely different character to which the same stringent regulations have not been applied. Another observation is that the contract was something entirely different from the receipt. The receipt was, no doubt, closely connected with the contract, but the two facts which the document proved were really independent of each other. The receipt might have been good, and the contract bad, or the contract might have been good, and the receipt bad. Then there is another case—*Ionides* v. *Pacific Fire and Marine Insurance Company* (3)—which comes perhaps in some respects nearer to the present case, because it had reference to the slip of a marine policy, about which the law has been invariably strict, and there Lord *Blackburn*, then Mr. Justice *Blackburn*, in delivering the considered judgment of the Court of Queen's Bench, consisting of himself, Lord Chief Justice *Cockburn*, and Lord *Hannen*, then *Hannen*, J., after referring to 30 Vict. c. 23, ss. 7 and 9 and two previous enactments, says (4): "As the slip is clearly a contract for marine insurance, and is equally clearly not a policy, it is by virtue of these enactments, not valid, that is, not enforceable at law or in equity; but it may be given in evidence wherever it is, though not valid, material; and in the present case it is material."

(1) 1 D. M. & G. 572.
(2) Ibid. 575.
(3) Law Rep. 6 Q. B. 674.
(4) Ibid. 685.

KEKEWICH, J. 1891 ASHLING v. BOON.

That I understand to mean that it might be given in evidence where it was material to prove some fact independent of the existence of the policy. Of course it was material to prove that, and to allow the slip to be given in evidence to prove that would have been contrary to the statute which provided that no contract for sea insurance should be valid unless expressed in a policy, and that no policy should be pleaded or given in evidence in any Court unless duly stamped. The learned Judge must, therefore, have meant some material fact outside the policy itself. Therefore that case goes to shew, as, I think also does *Evans* v. *Prothero* (1), that a document insufficiently stamped is not admissible in evidence unless the fact to be proved is something collateral to the document itself. Now is the evidence of a receipt in a case of this kind collateral in that sense? On the best consideration I can give to the case, and after listening to the arguments of counsel, I think that the receipt of money acknowledged by a promissory note is of the very essence of the promissory note itself. It is impossible to read this document partly as a receipt and partly as a promissory note. It is a promissory note given for £40 value received, and if I were to admit it as evidence of the receipt of that sum, I should be giving a right to sue for this £40 by virtue of this instrument which is a promissory note, notwithstanding that the statute says that it shall not be available for any purpose whatever. I think on these grounds, though I confess with some reluctance, that I must reject this evidence. I do so with the less hesitation, because the rejection of it need not stop the case. This can only be a question of account. It is not the foundation of the Defendant's claim, but only one of the items, though it be the first, in his claim.

The hearing of the action was then proceeded with, and in the result his Lordship held that the Defendant had proved that advances to the extent of £200 had been made by him as alleged, but that the existence of the alleged equitable mortgage had not been proved.

(1) 1 D. M. & G. 572.

Judgment was then, by consent of the parties, given for immediate foreclosure absolute as regarded the lands comprised in the mortgage for £550, and for recovery of the other lands by the Plaintiffs.

KEKEWICH, J.
1891
ASHLING v. BOON.

Solicitors: *Harper & Battcock; W. B. Glasier*, agent for *Glasier, King's Lynn.*

C. C. M. D.

C. A.
1890
CHITTY, J.
Dec. 5.
C. A.
1891
Jan. 28, 29.

MILLS *v.* DUNHAM.

[1890 M. 3337.]

Agreement in Restraint of Trade—Validity—Reasonableness—Intention of Parties.

An agreement for the employment of the Defendant as a traveller provided, that he was to "call upon and solicit orders" for all articles in the way of the Plaintiffs' business of antiseptic manufacturers, and in the event of the termination of the agreement, that he should not, either on his own account or for any employer, "call upon, or directly or indirectly solicit orders from, or in any way deal or transact business with," any one, who had, while the agreement was in force, been a customer of the Plaintiffs. After the termination of the agreement, the Defendant entered the employment of rival antiseptic manufacturers, and, as their traveller, called upon and solicited orders from some of the Plaintiffs' customers. On motion by the Plaintiffs to restrain the Defendant from committing any further breach of the agreement:—

Held, by *Chitty*, J., and by the Court of Appeal, that the meaning of the agreement, according to its true construction, was to prevent the Defendant, after leaving the Plaintiffs' employ, from transacting, with persons who had been customers of the Plaintiffs while the agreement was in force, business of a similar kind to that carried on by the Plaintiffs; that this was not a greater restraint than was necessary for the protection of the employers; and that the agreement was therefore valid and could be enforced to this extent.

Principles on which agreements in restraint of trade should be construed stated.

THE Plaintiffs, Messrs. *Mills & Mitchell*, who were in partnership under the style or firm of "*The Food Antiseptic Company*," carried on the business of manufacturers of a food preservative known as "*Frigiline*." In March, 1887, the Defendant entered their service as traveller. An agreement under seal was executed by the Plaintiffs and Defendant in March, 1887, expressed to be made "between *G. S. Mills* and *A. Mitchell*, of ——, manufacturers, trading under the style of the *Food Antiseptic Company*" of the one part, and *Dunham* of the other part, whereby it was witnessed "that the said *G. S. Mills* and *A. Mitchell* hereby engage the said *J. V. Dunham* as a traveller and assistant as from the 14th day of March, 1887, at a salary at the rate of £104 per

annum, to be paid weekly as hereinafter mentioned, and 6*s.* per week to cover all expenses while travelling in *London* and suburbs, and 10*s.* per day to cover all expenses while travelling in the country." And it was thereby agreed—"(1.) That the said *J. V. Dunham* agrees to become the traveller and assistant of the said *G. S. Mills* and *A. Mitchell* as from the said 14th day of March, 1887, at the aforesaid salary. (2.) That the said *J. V. Dunham* shall devote his whole time, and his best energies and attention, to promote and further the said business of the said *G. S. Mills* and *A. Mitchell.* (3.) That it shall be, amongst other things, the duty of the said *J. V. Dunham* to travel the country and districts required by the said *G. S. Mills* and *A. Mitchell*, and to call upon and solicit orders for all articles and commodities in the way of the said *G. S. Mills* and *A. Mitchell's* trade or business of antiseptic manufacturers, and to receive moneys for or on account of the said *G. S. Mills* and *A. Mitchell*, and to transmit by the first practicable post, or otherwise deliver, all orders and moneys so received, to the said *G. S. Mills* and *A. Mitchell.* (4.) That the said *J. V. Dunham* shall make a daily report to the said *G. S. Mills* and *A. Mitchell* of all calls made by or upon him, and also shall keep proper accounts and books, to be provided for that purpose by the said *G. S. Mills* and *A. Mitchell*, and such shall, when required, be made up and delivered to the said *G. S. Mills* and *A. Mitchell*, whose sole property the same shall be. (5.) That one week's notice on either side, and given at any time, or a breach by the said *J. V. Dunham* of the stipulations of this agreement, shall terminate this agreement; and, in the event of the termination of this agreement by such one week's notice given on either side, or breach of the stipulations or otherwise, it is agreed that the said *J. V. Dunham* shall not, for, or on account of any employer, or on his own account, at any time, either by himself, or in partnership with any other person, or persons, or firm, call upon, or directly or indirectly solicit orders from, or in any way deal or transact business with, any person or firm who, during the continuance of this agreement, shall be customers of the said *G. S. Mills* and *A. Mitchell*, or any future successors of the *Food Antiseptic Company*, or any of the successors in business of such customers."

C. A. 1891 MILLS v. DUNHAM.

The Plaintiffs became dissatisfied with the Defendant in the middle of 1890, and on the 1st of September, pursuant to the terms of the agreement, gave him notice determining the employment. Subsequently, the Defendant entered the employ of the *Freezall Food Preservative Company*, who carried on a similar business to that of the Plaintiffs, and he had, as their traveller, called upon, and solicited orders from, some of the Plaintiffs' customers. The Plaintiffs now moved to restrain the Defendant from committing any further breaches of the said agreement. It was admitted at the Bar that there had been a breach of the agreement by the Defendant, the defence being that the agreement was an unlimited restraint of trade, and therefore void.

The motion was heard before Mr. Justice *Chitty* on the 5th of December, 1890.

Byrne, Q.C., and *Upjohn*, for the Plaintiffs:—

The restrictions imposed upon the Defendant by this agreement are only such as are reasonably necessary for the protection of the Plaintiffs' business; the fair construction of the words "call upon" and "solicit orders from" is to limit them to calling upon old customers and soliciting orders for articles and commodities similar to those sold by the Plaintiffs; if necessary, the covenant is severable and capable of enforcement: *Baines* v. *Geary* (1).

[CHITTY, J.:—The Court cannot create or carve out a new covenant for the sake of validating an instrument which would otherwise be void: *Baker* v. *Hedgecock* (2).]

Nicholls v. *Stretton* (3) shews that such a covenant is separable, and that at any rate it is good, as regards those persons who were customers during the continuance of the agreement; but if the general intention of the parties and the whole agreement is looked at, the restriction is reasonable and can be enforced. The words "deal with or transact business" are limited to the same class of business as the Plaintiffs. That is clearly the intention.

(1) 35 Ch. D. 154. (2) 39 Ch. D. 520.
(3) 7 Beav. 42; 10 Q. B. 346.

Levett, for the Defendant :—

The covenant is much too wide; it puts it in the power of the Plaintiffs to exclude the Defendant from all business whatever with the former customers of the Plaintiffs. The words are, shall not "in any way deal or transact business with"; there is no limitation as to its being a similar business. A covenant like this, originally too wide, cannot be corrected by a statement that it was only intended to protect a particular business. If the intention of the parties is to govern the construction of agreements of this kind, there is no agreement in restraint of trade which might not in that way be held good. The Court must look at the wording of the covenant. Unless the covenant here is severable, the Plaintiffs must fail, and I submit that the covenant is not severable. There is no limit as to time or place; it is much too wide, and therefore void as an unlimited restraint of trade.

Byrne, in reply :—

The covenant does not go further than is necessary to give reasonable protection to the person imposing it; in this way it is capable of a reasonable construction: *Rannie* v. *Irvine* (1). The restraint is not shewn to be unreasonable by the fact that it is not limited to any particular time: *Hitchcock* v. *Coker* (2).

CHITTY, J. :—

There are two principal or general rules applicable to cases of the kind now before me. The first is, when a covenant or agreement is impeached on the ground that it contains an unreasonable restraint of trade, the duty of the Court is, first to interpret the covenant or agreement itself, and to ascertain according to the ordinary rules of construction what is the fair meaning of the parties, and then to apply the rule as to reasonableness with reference to the extent of the impeached covenant, and to see whether it goes too far; in other words, to adopt the modern rule with reference to perpetuities, a cognate subject, where, when a limitation is impeached on the ground of being too remote, the right way is to consider the instrument without

(1) 7 Man. & G. 969. (2) 6 A. & E. 438, 454.

C. A. 1891 MILLS v. DUNHAM. Chitty, J.

reference to the rule of perpetuity, and then, having ascertained the true meaning of the parties, to apply the rule.

The second principal or general rule which I think applies is this, that where there is a question of severing the good from the bad part of a covenant or agreement of this kind, the Court must find in the agreement itself sufficient ground for making the severance; the Court must take great care not to create a new agreement for the parties, nor carve out of an unreasonable agreement, something which would be reasonable, for the sake of upholding what would be otherwise void.

Now I will proceed to consider this case, which is an interesting one. The true meaning of the agreement is to be gathered, according to the well-known rule, from the four corners of the agreement itself.

[His Lordship then stated the agreement, observing that the words "traveller and assistant" meant as traveller and assistant in relation to the particular business, and that the words "call upon" must mean make business calls; and having read the clause in restraint of trade, upon which the present action was commenced, continued:—]

It is asserted by the Defendant that this clause is unreasonable, and that, reading it according to its true interpretation, it imposes a restraint upon any kind of dealing whatever with any persons who were, during the continuance of the agreement, customers of the Plaintiffs. I will examine the clause a little more minutely to ascertain whether this assertion is true. The term "call upon," as I have already said in commenting upon the earlier clauses of the agreement, means a business call; and I shall not, I think, be departing from the real meaning of parties, when I say that the words "call upon or directly solicit orders" from the firm's customers, means orders for articles or commodities in the way of the trade or business of the Plaintiffs. There is no occasion for me to read these words with such minute exactness as shall not give effect to the intentions of the parties; I must read them reasonably, and I think I am reading them in a way that commends itself to good sense, and in conformity with the observations of *Maule*, J., in *Rannie* v. *Irvine* (1), "that a

(1) 7 Man. & G. 978.

covenant of this kind must have a reasonable construction," by reading them in the way that I have just read them. The part of the clause that at first sight seemed the most objectionable was that part which contains the words, "in any way deal or transact business with" any old customers, and upon that it is said, no matter what the business is—it may be to buy the necessities of life—if the Defendant attempts to do it with any of the old customers of the Plaintiffs' firm, there is a prohibition against it. It appears to me that dealing or transacting business with the old customers, means, business of the same or a similar kind to that which had been carried on by the Plaintiffs. In putting this construction on these words, I avoid what to me appears an extravagant construction of the words "in any way deal or transact business with," and the result is, that I think upon the true construction of this instrument, it is not open to the objection which has been brought against it by the Defendant. It was also urged against it, that it was an agreement during the whole of the life of the Defendant; but I am satisfied upon the authorities, without going through them, that in a case of this kind that is not an unreasonable limit of time. Under these circumstances I think it is not necessary for me to consider further whether some part of the agreement can be severed as good, from the rest which is bad, because I think the whole is good; but I may add that, in my opinion, I could sever the earlier part of the clause in question, viz., the words "call upon or directly or indirectly solicit orders," from the latter portion, viz., the words "or in any way deal or transact business with" the old customers, if it were necessary; but, as I have already said, I am not called upon to pronounce any definite opinion on that matter.

I think the Plaintiffs, therefore, are entitled to an injunction, which must follow the words of the agreement, restraining the Defendant from calling upon or soliciting orders from or in any way dealing with any persons who had been customers of the Plaintiffs during the agreement, contrary to the true intent and meaning of that instrument.

W. C. D.

C. A.

The Defendant appealed. The appeal was heard on the 28th of January, 1891.

C. A. 1891 MILLS v. DUNHAM.

Levett, Q.C., for the Appellant:—

I contend that this covenant is void, as being in general restraint of trade, and going far beyond what was needed for the protection of the employers. (1.) As to what it restrains the Defendant from doing. His duties were confined to soliciting orders for articles in which the Plaintiffs traded; the restriction would prevent his selling milk to a dairyman or buying meat from a butcher, if they had been customers of the Plaintiffs while he was in their employment.

[LOPES, L.J., referred to *Baines* v. *Geary* (1), as to severing the parts of an agreement.]

A single stipulation cannot be split up for the purpose of enforcing something contained in it which, if standing alone, would be valid.

[KAY, L.J., referred to *Baker* v. *Hedgecock* (2).]

If there are two limits of time mentioned in the covenant, or two limits of space, or a particular business with general words including others, you may reject one; but you cannot split a single stipulation.

[LOPES, L.J., referred to *Davies* v. *Davies* (3).]

Clause 5 must be read as plain English, and it says in clear terms that the Defendant is not to deal with any of the Plaintiffs' customers in anything. The Plaintiffs meant to say: "We introduce you to our customers, and after you leave our employment you shall not deal with them in any way." A stipulation in restraint of trade is *primâ facie* void on grounds of public policy; an exception is made where it goes no further than is necessary for the reasonable protection of the party claiming the benefit of it; but the burden of proof lies on him to shew that it is reasonable. There is no principle on which the words of this covenant can be cut down. (2.) There is no limit as to time; the restriction, therefore, extends to the whole life of the Defendant.

[KAY, L.J.:—Would a covenant not to deal in "*Frigiline*" be too wide because it extended to his whole life?]

(1) 35 Ch. D. 154. (2) 39 Ch. D. 520. (3) 36 Ch. D. 359.

Perhaps not; but the covenant here is not restricted to particular articles. (3.) There is no limit as to space. If it could be made out that this covenant only prevented the Defendant from using to the Plaintiffs' prejudice knowledge which he gained in their employment, it would be good; but it cannot be so confined. I do not travel through the old cases; but as to limitation of space, I refer to *Allsopp* v. *Wheatcroft* (1).

[LOPES, L.J.:—That case was disapproved of in *Rousillon* v. *Rousillon* (2).]

On the question of severance, I rely on *Baker* v. *Hedgecock* (3) and *Pickering* v. *Ilfracombe Railway Company* (4). The Court will not allow a person to take a wide covenant from a servant, and then put a narrow construction on it to save it from illegality.

Byrne, Q.C., and *Ingpen*, for the Plaintiffs:—

If necessary, this covenant might be severed: *Rannie* v. *Irvine* (5); *Baines* v. *Geary* (6); *Price* v. *Green* (7); *Hayne* v. *Burchell* (8). But we contend that, according to the true construction of the instrument, clause 5 ought to be taken in a limited sense. The contention that the agreement, being in restraint of trade, is *primâ facie* void, and that the *onus* lies on us to prove it reasonable, is ill-founded. *Mumford* v. *Gething* (9) shews that agreements of this kind, if properly restricted, are to be regarded as for the benefit of the public. If so, a document of this kind should be construed without bias, to see what the parties mean; and in case of ambiguity the Court should lean to so construing it, *ut res magis valeat quam pereat*. Now, the object of employing the Defendant was to push the business of antiseptic manufacturing, which the Plaintiffs were carrying on. Regard must be had to this all through the agreement—when the parties speak of "business," they mean such business as the Plaintiffs were carrying on.

[LOPES, L.J. Suppose the words had been "any business"?]

(1) Law Rep. 15 Eq. 59.
(2) 14 Ch. D. 351.
(3) 39 Ch. D. 520.
(4) Law Rep. 3 C. P. 235, 250.
(5) 7 Man. & G. 969.
(6) 35 Ch. D. 154.
(7) 16 M. & W. 346.
(8) 35 Sol. J. 88.
(9) 7 C. B. (N.S.) 305; 29 L. J. (C.P.) 105.

C. A. 1891 MILLS v. DUNHAM.

That might have been held to necessitate the construction for which the Defendant contends; but "business" may readily be taken referentially. The language of this agreement is loose, and deficient in words of reference and limitation: for instance, in clause 4, you cannot suppose that the Defendant was to make a return of "all calls" made by or upon him—you must import "in relation to the said business." The restraint here is reasonable: *Nicholls* v. *Stretton* (1); though there is no limit of time: *Hitchcock* v. *Coker* (2). The being reasonable is the test: *Horner* v. *Graves* (3). The restriction must be looked at as a whole, and it may be reasonable, though there is no restriction as to space: *Leather Cloth Company* v. *Lorsont* (4); *Rousillon* v. *Rousillon* (5). The decision ought to be affirmed.

Levett, in reply:—

In the early clauses the parties speak of "the said business," or "the Plaintiffs' business"; but in the 5th they speak of "business" simply. This supports my contention. The Plaintiffs, no doubt, meant to protect their business, and they sought to gain this object by preventing the Defendant from coming near their customers. A covenant like this ought to be construed most strongly against the party imposing it.

[LINDLEY, L.J.:—The effect of that would be to cut it down as far as possible, which in the present case is in favour of the Plaintiffs.]

The Vice-Chancellor *James*, in *Leather Cloth Company* v. *Lorsont* (6), shews that he considered agreements in restraint of trade to be *primâ facie* bad.

[LOPES, L.J.:—The reference to customers seems to throw light on what is meant by "business."]

1891. Jan. 29. LINDLEY, L.J.:—

This is an appeal by the Defendant from an order of Mr. Justice *Chitty*, restraining him from dealing with customers of the

(1) 10 Q. B. 346.
(2) 6 Ad. & E. 438, 457.
(3) 7 Bing. 735.
(4) Law Rep. 9 Eq. 345.
(5) 14 Ch. D. 351.
(6) Law Rep. 9 Eq. 345, 354.

Plaintiffs in violation of an agreement entered into by him. The case turns upon the question whether that agreement has been correctly construed by the learned Judge. If it has, the order appealed from is right; if not, then the order is wrong. The facts which it is necessary to bear in mind may be very shortly stated. *Dunham*, in 1887, entered into the employment of two persons, who were carrying on business in partnership under the style of "*The Food Antiseptic Company.*" The business consisted in the manufacture of an antiseptic substance known as "*Frigiline.*" What its nature is does not concern us. The agreement for service was determined by notice, and *Dunham* entered into the service of a rival firm, who sold an antiseptic substance which they called "*Freezall.*" The contract between the Plaintiffs and the Defendant is not as clear as it might be. The Defendant is engaged by the Plaintiffs to act as their traveller and assistant at a salary, with an allowance at a certain rate for travelling expenses in *London*, and at another rate in the country. This must mean that he is to travel for them in *England* and *Wales*; it cannot extend to *China* or *Japan*. The Defendant then agrees (1.) to become the traveller and assistant of the Plaintiffs at the above salary; and (2.) to devote his whole time, his best energies and attention to promote and further the business of the Plaintiffs. (3.) That it shall be, amongst other things, the duty of the Defendant to travel the country and districts required by the Plaintiffs, and to call upon and solicit orders for all articles and commodities in the way of the Plaintiffs' trade or business of antiseptic manufacturers, and to receive moneys for or on account of the Plaintiffs, and to transmit by the first practicable post, or otherwise deliver, all orders and moneys so received to the Plaintiffs. I apprehend that "country and districts required by the Plaintiffs" is not to be read in such a sense that the Plaintiffs could have required the Defendant to go abroad. (4.) The Defendant agrees to make a daily report of all calls made by or upon him. This must refer to calls made by or upon him in relation to the Plaintiffs' business. Then comes the 5th, which is the important clause, and provides that after the determination of the agreement by notice or by breach of the stipulations or otherwise, "the said *J. V. Dunham* shall not,

C. A. 1891 MILLS v. DUNHAM. Lindley, L.J.

for or on account of any employer, or on his own account, at any time, either by himself or in partnership with any other person or persons or firm, call upon, or directly or indirectly solicit orders from, or in any way deal or transact business with, any person or firm who during the continuance of this agreement shall be customers of the said *G. S. Mills* and *A. Mitchell*, or any future successors of the *Food Antiseptic Company*, or any of the successors in business of such customers."

That clause is expressed in very wide terms. It is contended on one side that it means literally what it says; and, according to that construction, it would preclude the Defendant from having communication with any of the customers of the Plaintiffs' firm on any business whatsoever; would forbid his calling on any of those customers to solicit orders for a watchmaker or an umbrella-maker. Mr. *Levett* says this is what the parties were driving at. The other side say that you must look to the other clauses of the deed to see what the parties were driving at, and that this clause must be limited to business similar to that carried on by the Plaintiffs, and that to give it any wider operation, though not doing violence to the language of the clause, would be doing violence to the spirit of the agreement. Now, the first thing we have to do is to ascertain the real meaning of the parties by construing the agreement without any leaning either way. I think that Mr. *Levett's* contention that you are to treat a restraint of trade as *primâ facie* bad, and throw upon the person supporting it the *onus* of shewing that it is reasonable, is introducing a wholly unsound principle into the construction of documents. I do not think that Vice-Chancellor *James*, in *Leather Cloth Company* v. *Lorsont* (1), meant to lay down any such rule. His Lordship says: "All the cases, when they come to be examined, seem to establish this principle, that all restraints upon trade are bad as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract." And on these expressions Mr. *Levett* relied. But his Lordship went on to say: "Public policy requires that when a man has by skill or by any other means obtained something

(1) Law Rep. 9 Eq. 345, 353.

which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it advantageously in the market it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy that enables him to do that does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation, however restrictive it is, provided that restriction in the judgment of the Court is not unreasonable, having regard to the subject-matter of the contract." Looking at the whole of the language, I do not understand his Lordship as saying that you are to approach the contract with a leaning either way. You are to construe the contract, and then see whether it is legal.

In my opinion, the construction which Mr. Justice *Chitty* has put upon this contract is the true one. I cannot think that the parties intended such a wide restraint as has been contended for by Mr. *Levett*. The object of the Plaintiffs was to prevent the Defendant from being allowed to do anything which would be detrimental to their business; and I think that "transact business" ought to be construed as confined to business similar to that of the Plaintiffs. If that view be correct, it does not appear to me that the agreement goes beyond what is reasonable for the protection of the Plaintiffs, and that, considering its nature, it is, according to the cases referred to in *Davies* v. *Davies* (1), not made unreasonable by there being no limitation as to time or distance. It is, therefore, unnecessary to consider the question whether the covenant is severable. The appeal will be dismissed.

LOPES, L.J.:—

I entirely agree, and will shortly state my reasons. The principle deducible from all the cases is that the question to be determined is, whether the restraint, having regard to all the circumstances of the case, and the nature of the employment, is greater than is necessary for the protection of the person in whose favour it is imposed. Mr. *Levett* argues that in the present case

(1) 36 Ch. D. 359.

C. A. 1891 MILLS v. DUNHAM. Lopes, L.J.

the covenant in clause 5 is so wide that it will prevent *Dunham* from having any dealings at all with any persons who were customers of the Plaintiffs during his employment; that *Dunham* could not buy beef or watches from any of those customers, and could not be employed by any of them about any business. The Plaintiffs say that, on the true construction of the document, those wide terms ought to be confined to a business similar to that of the Plaintiffs. An agreement of this kind must be construed like any other agreement—that is, you must without any bias on one side or the other extract the intention of the parties from their words. I agree that if clause 5 stood alone it would be difficult to escape from Mr. *Levett's* conclusion. But in construing one clause of an agreement the whole of the agreement must be looked to. Here I find, first, that the Plaintiffs are described as manufacturers, trading under the style of "*The Food Antiseptic Company*"; next, that *Dunham* engages to do his utmost to promote and further "the said business" of the Plaintiffs. Then, by clause 3, his duty is defined as being to travel the country as required by the Plaintiffs, and to call upon and solicit orders for all articles and commodities in the way of the Plaintiffs' trade or business of antiseptic manufacturers. After looking at those provisions, I take up clause 5, which provides that after the determination of the agreement *Dunham* shall not, "for or on account of any employer, or on his own account at any time, either by himself or in partnership with any other person or persons or firm, call upon, or directly or indirectly solicit orders from, or in any way deal or transact business with, any person or firm who, during the continuance of this agreement, shall be customers of" the Plaintiffs, or their successors in business. Construing this by the light of what has gone before, I am compelled to the conclusion that what the parties had in view was not business of any kind, but business of the kind mentioned before. If so, the stipulation does not go beyond what is reasonable for the protection of the Plaintiffs, and is, in my opinion, a legal stipulation. In coming to this conclusion, we have the satisfaction of knowing that we are doing substantial justice, for the Defendant is acting for a firm who are in direct rivalry with the Plaintiffs.

KAY, L.J.:—

C. A.
1891
MILLS
v.
DUNHAM.

I do not dissent from the conclusions of my learned Brethren that the decision of Mr. Justice *Chitty* in this case ought to be affirmed. We do not at all doubt the law on the subject. It is shewn by *Mumford* v. *Gething* (1) that stipulations of this kind are looked upon as advantageous to the public if so restricted as not to go beyond what is needed for the protection of the employer. They ought not then to be construed with a bias as being *primâ facie* illegal, but construed fairly. Still the difficulty I have felt has not been entirely removed as to what is the meaning of the words in clause 5, and whether Mr. *Levett's* construction of them is not the better one. The Plaintiffs' business is not mentioned in detail; it is first alluded to in the description of the Plaintiffs, and is next referred to as "the said business" of the Plaintiffs. Then clause 5 contains no reference to "the said business," and no reference to the manufacture of antiseptic substances, and, as Mr. *Levett* forcibly observed, the phrase is changed, an expression is used which does not merely denote that the Defendant shall not compete with the Plaintiffs' business, but the agreement is that he shall not in any way deal or transact business with any of the Plaintiffs' customers. Mr. *Levett* contends that the Plaintiffs, in framing the agreement, were not satisfied with binding the Defendant not to apply to the customers on behalf of any competing business, but intended to preclude him from having any business relations with any of the customers. Looking at clause 5 alone, that is its plain meaning; for I cannot see any difference between "shall not in any way transact business" and "shall not transact any business whatever." It was suggested that the use of the word "customers" had an effect on the construction of "business"; but I think the only effect of the word is to define the persons with whom business was not to be carried on. I agree that the whole of the document is to be looked to; but my doubt has been whether there is in clause 5 such ambiguity as to let in the canon of construction which allows us to explain an expression by reference to other parts of the document. With much doubt, I think there is. If there is any ambiguity in a stipulation between employer

(1) 7 C. B. (N.S.) 305.

C. A. 1891 MILLS v. DUNHAM. Kay, L.J.

and employed imposing a restriction on the latter, it ought to receive the narrower construction rather than the wider—the employed ought to have the benefit of the doubt. It would not be following out that principle correctly to give the stipulation a wide construction so as to make it illegal and thus set the employed free from all restraint. It is also a settled canon of construction that where a clause is ambiguous a construction which will make it valid is to be preferred to one which will make it void. This is analogous to the rule laid down in *Grey* v. *Pearson* (1), referred to in *Abbott* v. *Middleton* (2). For these reasons I am of opinion that the decision of Mr. Justice *Chitty* ought to be affirmed.

Solicitors for Plaintiffs: *Morgan, Son, & Upjohn.*
Solicitors for Defendant: *George Reader & Co.*

H. C. J.

C. A. 1890 STIRLING, J. *Nov.* 28. C. A. 1891 *Jan.* 24; *Feb.* 4.

In re TAYLOR, STILEMAN, & UNDERWOOD.

Extent of Solicitor's Lien—Security—Waiver of Lien.

A firm of solicitors received for some years on behalf of a lady the income payable to her under the trusts of a will, and from time to time made advances to her and payments on her account. On being applied to for delivery up of her papers, they sent in an account of their receipts and payments shewing a balance of £81 due to them, and claimed a lien for that sum. The only item in the account of such a nature that the Taxing Master could have moderated it was "Our costs to date, £20." She applied for an order for delivery of her papers on payment of £20 into Court. *Stirling*, J., refused the application, holding that the £81 ought to be paid into Court:—

Held, by the Court of Appeal, that a solicitor's lien extends only to his taxable costs, charges, and expenses, which category includes all disbursements which can be moderated by the Taxing Master and are not necessarily allowed in full on being vouched, but does not include ordinary advances; that there therefore was no lien for anything more than so much of the £20 as should be allowed on taxation, and that the order asked for ought to have been made.

After the decision of *Stirling*, J., the new solicitors of the lady discovered that she and her husband had given to the solicitors a joint and

(1) 6 H. L. C. 61. (2) 7 H. L. C. 68.

several promissory note, payable on demand, and bearing interest at £5 per cent., as security for what was due from her:—

Held, that whether the taking security by a person having a lien is an abandonment of the lien depends on the intention, whether expressed or to be gathered from the circumstances of the case; that *primâ facie* where a solicitor whose duty it is to advise his client as to his rights and liabilities takes from his client a security for costs without explaining that he intends to reserve his lien, the lien is abandoned, and that such was the result in the present case.

MESSRS. *Taylor, Stileman, & Underwood* acted as solicitors to Mrs. *Payne Collier*, a married woman. They were in the habit of receiving for her her share (amounting to about £360) of the income of the residuary estate of General *Lawrenson*. They from time to time made advances to her in anticipation of her income, and made various payments on her behalf.

In November, 1890, Messrs. *Mear & Fowler*, solicitors, by the authority of Mrs. *Payne Collier*, applied to *Taylor & Co.* for delivery to them of Mrs. *Payne Collier's* papers. *Taylor & Co.* said that there were sums due to them for costs and advances, and that on payment thereof they would be ready to hand over the papers.

Taylor & Co. then made out and delivered a cash account from January, 1890, to November, 1890. An extract from that account is given.

	£	*s.*	*d.*		£	*s.*	*d.*
May 27.—To balance to us brought down . . .	58	10	10	Aug. 21.—By cash, quarterly, amounting to 30th ult. .	184	6	10
June 3.—To cash: Private Hire Co., 2nd instalment	34	17	6	Balance carried down	17	7	1
July 3.—To cash: Mrs. Reeves' quarter's rent of the Camp to Midsummer	8	2	7				
Aug. 11.—To cash: For sheriff's charges at Blackler	11	11	0				
„ 21.—To cash: Weekly payments to you from 24th of March last to date, and for postal orders . .	86	2	0				
Interest on advances to date .	2	10	0				
	201	13	11		201	13	11

The subsequent part of the account was similar in character. It commenced with a balance of £17 7*s.* 1*d.* to the credit of

C. A. 1891 — *In re* TAYLOR, STILEMAN, & UNDERWOOD.

Taylor & Co., and the last item to their credit was "our costs to date, £20 12*s.* 9*d.*" On the other side was £91 4*s.* 7*d.* received from General *Lawrenson's* trustees, and the result was a balance of £81 14*s.* 2*d.* in favour of *Taylor & Co.*

Mear & Fowler insisted that *Taylor & Co.* had no lien except for costs, and asked that the papers should be handed over on their undertaking to pay the costs, or on their paying the amount of costs under protest. *Taylor & Co.* declined to hand over the papers except on payment of the £81 14*s.* 2*d.*

Mrs. *Payne Collier* then moved in this matter that she might be at liberty to pay into Court £20 12*s.* 9*d.*, without prejudice to taxation of the bill of costs, and that *Taylor & Co.* might be ordered to hand over her papers.

The motion was heard before Mr. Justice *Stirling* on the 28th of November, 1890.

Macnaghten, for the application.

Maidlow, for the solicitors.

STIRLING, J.:—

The solicitors in this case claim a lien for £81 14*s.* 2*d.* It is not the practice of the Court to make a summary order for delivery up of a client's papers except on the terms of the client giving security for the amount for which a lien can be claimed. Here the client contends that the nature of the cash account was such that the items paid by the solicitors were not sums paid by them in the character of solicitors, and that there is nothing for which they can claim a lien except the £20 12*s.* 9*d.* costs, and she relies upon *In re Galland* (1). I agree that the solicitors cannot claim any lien for any sums due to them otherwise than in the character of her solicitors; but before I make a summary order in her favour, I must satisfy myself that there is not fair ground for saying that the solicitors claim these sums in the character of her solicitors. The sums for which credit is given to the client are the quarterly instalments of an annuity payable to her by the trustees of a will, and it seems to me that the

(1) 31 Ch. D. 296.

solicitors must be taken to have received these sums as her solicitors. Now, if the sums received by them on her behalf were received by them as her solicitors, it seems to me that the payments made by them to her or on her behalf ought properly to be taken as made in the same character. Looking at the relation of the parties to each other, and to what the lady has done, and looking at the form of the common order to tax, which directs the solicitor to give credit for all sums of money received by him from or on account of the client, and gives him liberty to charge all sums of money paid by him to or on account of the client, it seems to me that there are fair grounds for saying that the solicitors have a lien for the greater part of the amount they claim. I think, therefore, that an order ought not to be made for delivery up of the papers on payment of £20 12*s.* 9*d.* only into Court.

Mrs. *Payne Collier* appealed.

After the order under appeal had been made, *Mear* and *Fowler* discovered that on the 8th of January, 1890, Mr. and Mrs. *Payne Collier* had given to *Taylor & Co.* as security for what was due from her a promissory note in the following form: "On demand we jointly and severally promise to pay to Messrs. *Taylor, Stileman, & Underwood,* or order, the sum of £200 with interest thereon from the date hereof at the rate of £5 per cent. per annum for value received"; and that on the 20th of February, 1890, Mrs. *Payne Collier* had given to *Taylor & Co.* the following memorandum: "In consideration of the sum of £10 paid to me on 9 January last, and of the further sum of £37 10*s.* paid to me on 14 January last, and of other sums paid for me or on my behalf at my request, I hereby charge the policy No. 36527 on my life in the *British Empire Mutual Life Assurance Company,* taken out by Mr. *Wallace* in his name, with the repayment to you of the sum of £200 and interest thereon at 5 per cent. from the 8th day of January last, and I undertake to do whatever may be necessary to vest the said policy in you."

Taylor & Co. adduced evidence to shew that the surrender value of the policy at that time was £8 10*s.* They stated that

C. A. 1891 — *In re* Taylor, Stileman, & Underwood. — C. A.

the promissory note had been discharged, and that they no longer claimed any rights under it. It had, however, never been returned to Mr. and Mrs. *Payne Collier*.

The appeal came on for hearing on the 24th of January, 1891.

Cozens-Hardy, Q.C., and *Macnaghten*, for the Appellant:—

There could not be any lien for more than the £20 12*s.* 9*d.*, for a solicitor's lien does not extend to moneys advanced by him to his client, but only to costs and moneys paid by him in his character of solicitor: *In re Galland* (1). Mr. Justice *Stirling* was unduly pressed by the form of the common order for taxation, which ought not to have such influence as he attributed to it.

[Lopes, L.J., referred to *Blunden* v. *Desart* (2).]

Then we have another point which was not before Mr. Justice *Stirling*, that all lien has been lost by taking security: *Cowell* v. *Simpson* (3); *Balch* v. *Symes* (4); *Robarts* v. *Jefferys* (5), which last case is almost identical with the present.

[Lindley, L.J., referred to *Chase* v. *Westmore* (6).]

We say therefore that we are entitled to have our papers delivered up without any payment into Court; but as we offered by our summons to pay the £20 12*s.* 9*d.* into Court, we abide by that offer, though it would not have been made if Mrs. *Payne Collier's* present solicitors had been aware of the security given.

Hastings, Q.C., and *Maidlow*, for *Taylor & Co.*:—

As regards the giving security, we submit that the rule is only this: the security takes away the lien if it is inconsistent with the lien, but not otherwise: *Angus* v. *McLachlan* (7).

[Lopes, L.J.:—I doubt whether the lien of a solicitor stands on the same footing as that of an innkeeper.]

Jones v. *Peppercorne* (8) puts a banker's lien on the same footing as a solicitor's lien.

(1) 31 Ch. D. 296.
(2) 2 D. & War. 405.
(3) 16 Ves. 275.
(4) T. & R. 87.
(5) 8 L. J. (O.S.) (Ch.) 137.
(6) 5 M. & S. 180.
(7) 23 Ch. D. 330.
(8) Joh. 430, 442.

[LOPES, L.J.:—Have you any case where the lien has been held not to have been taken away though security had been given?

LINDLEY, L.J.:—The £5 per cent. interest is hardly consistent with the lien. How do you dispose of *Robarts* v. *Jefferys* (1)?]

That case may be explained on the ground of the impropriety of the solicitors taking interest on his costs and at the same time claiming a lien—interest on costs not being at that time allowable. There is nothing *per se* inconsistent with lien in taking security; the question must always be whether the security was intended to be cumulative or substitutionary. It is not inconsistent with lien that interest should be reserved. A vendor's lien is not always lost by taking security, though if the security is for payment at a distant day that is held inconsistent with lien and destroys it. So as to solicitor's lien in *Cowell* v. *Simpson* (2).

[KAY, L.J.:—If a man takes a specific security he is put in a better position. May it not be reasonably implied that he means to rely on the security alone?]

That would go against all the cases in which taking a security has not been held to destroy a vendor's lien.

[LOPES, L.J.:—May it not be considered just that a lien which is given to a solicitor because he has no security shall be lost if he takes a security?]

Then as to the amount to be brought into Court, the £20 12*s.* 9*d.* was at all events insufficient, for the £11 11*s.* for the sheriff's costs at *Blackler* on the 11th of August was an expenditure in the character of solicitor, and there must be a lien for that even if other sums advanced are disallowed.

[On investigation it appeared that these costs were costs of an execution against Mr. *Payne Collier*, under which some goods of Mrs. *Payne Collier* had been seized, and that *Taylor & Co.* had paid the sheriff out at her request.]

Mrs. *Payne Collier* instructed *Taylor & Co.* to get the sheriff out, and they must be taken to have advanced the money as her solicitors.

(1) 8 L. J. (O.S.) (Ch.) 137. (2) 16 Ves. 275.

C. A. 1891 *In re* Taylor, Stileman, & Underwood.

Lindley, L.J.:—

This is an appeal by Mrs. *Payne Collier* from a decision of Mr. Justice *Stirling* refusing to order her former solicitors to hand over her papers on payment into Court by her of £20 12*s.* 9*d.*, the amount claimed by them for costs, his Lordship considering that they had a lien for other moneys advanced by them for her. The case raises serious questions. First of all, we have to consider for what a solicitor is entitled to a lien on his client's documents. He has a lien for all taxable costs, charges, and expenses incurred by him as solicitor for his client; but he has no lien for ordinary advances or loans. His taxable costs, charges, and expenses would include money payments which he makes for his client in the course of his business, such as counsel's fees, which are taxable in this sense, that their allowance in full is not necessarily obtained by merely vouching them, but they may be moderated, being subject to the discretion of the Taxing Master as to the amount to be allowed; and for whatever costs, charges, and expenses can be so moderated, it appears to me that the solicitor has a lien upon all his client's papers; but the lien does not include other advances which do not come within this category. I come to this conclusion, not only upon the authorities referred to, but by reason of the language of sect. 28 of the *Solicitors' Act*, 1860.

The solicitor claims in this instance a lien for advances which it is alleged by him come under that character. I am of opinion that the bill contains nothing beyond the £20 12*s.* 9*d.*, for which a lien could be claimed. I thought at one time that the item of £11 11*s.* was an advance for which a lien could be claimed, because, as it was opened to us by Mr. *Maidlow*, there was a judgment against his client, and the sheriff was in possession, and the solicitor paid the sheriff out. If that had been so, he would have had a lien for such advance, for it would have been a payment which, if unreasonable in amount, would have been moderated by the Taxing Master. But it turns out that the judgment was against the client's husband; the sheriff took possession of the wife's goods, and the solicitor, at the request of Mrs. *Payne Collier*, paid him out. What the solicitor so paid is no more taxable as between him and his client than if the sheriff

Lindley, L.J.

had been in possession under a judgment against me, and she had asked the solicitor to pay him out. This advance, therefore, must come under the category of advances for which there was no lien, and not into the category of costs, charges, and expenses.

There was another important point raised by Mr. *Cozens-Hardy*. He contends that whatever lien the solicitor had was waived by his having taken a security, the security in this case being a promissory note for £200 given by the solicitor's client, who was a married woman, and by her husband, and bearing interest at £5 per cent. per annum, and also a charge upon a certain policy. Mr. *Cozens-Hardy* urges, that taking that security was a waiver of the lien which the solicitor would otherwise have, and in support of that contention he relies mainly upon the case of *Robarts* v. *Jefferys* (1). The point which was decided in that case appears to me to be the exact point which arises here.

In considering this point, we must be careful. Whether a lien is waived or not by taking a security depends upon the intention expressed or to be inferred from the position of the parties and all the circumstances of the case. In this particular instance we are dealing with a solicitor and his client. It strikes me that if a solicitor takes from his client such a security as this solicitor took the *primâ facie* inference is that he waives his lien. That appears to me the right and proper conclusion to come to, bearing in mind that it is the solicitor's duty to explain to his client the effect of what he is about to do. In the case of a banker, I should not draw the same inference, since a banker has not a similar duty towards his customer. Bearing in mind the position of the parties, and having regard to the decision of Sir *John Leach* in *Robarts* v. *Jefferys*, we are justified in saying that in the absence of evidence to the contrary, the true inference from the circumstances is that the lien was waived. Upon that ground, therefore, it appears to me that Mr. *Cozens-Hardy* is right. The appeal must be allowed.

LOPES, L.J.:—

A solicitor has a lien for his taxed costs, charges, and expenses, but that lien clearly does not extend to any money advanced for other purposes.

(1) 8 L. J. (O.S.) (Ch.) 137.

C. A. 1891 *In re* TAYLOR, STILEMAN, & UNDERWOOD. Lopes, L.J.

In this case the sum of £11 11*s.* was said to have been paid by the solicitor in order to release his client's furniture from the sheriff, and for some time I thought that this sum might be brought within the rule I have laid down; but when the matter came to be more fully investigated it appeared that the judgment was against the husband, not against the wife, but the wife's furniture was taken by the sheriff, and thereupon she applied to the solicitor and asked him to pay the sheriff out, which he did. Such a payment is not as I understand it a payment made in his capacity of solicitor, but in the same way as an ordinary friend might make such a payment at her request in order to release her furniture. It appears to me that a sum so paid could not be reduced by the Taxing Master, and does not come under the head of taxable costs, charges, and expenses, for which a lien can be claimed by a solicitor. The other items in the account, except the £20 12*s.* 9*d.* costs, clearly are not taxable. There could not, therefore, be any lien for more than £20 12*s.* 9*d.*

Another point is raised by the Appellant, that the solicitors have lost their lien by taking security. It appears to me that in each case the question whether the lien is waived by taking security must be decided according to the particular circumstances. I do not mean to say that taking a security necessarily imports an abandonment of the lien; but if there are circumstances in the taking of the security which are inconsistent with the continuance of the old security, it is to be inferred that the solicitor intended to abandon his lien. In the present case the security given is a promissory note payable on demand with interest at £5 per cent. under which the amount could be recovered at once. There is also a charge upon a policy. The promissory note is not given by the wife alone, but the husband joins as surety. Under these circumstances it is only a fair inference to draw that there was an intention between the parties to give up the old security of the lien and to rely on the security I have mentioned. I may add that we are deciding this point in accordance with the decision of Sir *John Leach* in *Robarts* v. *Jefferys* (1), not referred to in any text-book I

(1) 8 L. J. (O.S.) (Ch.) 137, 140.

have seen, where he says: "I am of opinion that the taking of this promissory note was altogether a waiver of the lien of the solicitor."

KAY, L.J.:—

In this case we are differing from Mr. Justice *Stirling* partly on materials which were not before him. Two very important points have been raised—one as to the extent of the ordinary lien of a solicitor, and the other how that lien is affected by taking another security.

I do not find in any of the cases cited nor in any of the books to which I have referred during the course of this appeal any exact definition how far the lien of a solicitor extends. *Morgan* and *Wurtzburg* on Costs (1) states simply, "A solicitor has a lien on the papers of his client in his hands for the amount of his costs." In another text-book I find "his professional charges," and the nearest approach to a definition that I can discover is by Sir *Thomas Plumer* in 1820, who says (*Worrall* v. *Johnson* (2)): "There are two kinds of lien that a solicitor has for his bill of costs; one on the funds recovered, and the other on the papers in his hands. If there be no fund and no cause, still the client cannot get back the papers without paying what is due, not only in respect of that business for which the papers were used, but for other business also. This lien, however, does not extend to general debts, but only to what is due to him in the character of attorney. That he has a right to retain, and it is in consequence the general practice for the client when he applies for an order for the delivery of his papers, to submit to pay the bills of costs generally." I think the meaning of that has been very clearly expressed by both the Lords Justices, that the lien extends to all those items which are properly included in the bill of costs, or, in other and more definite words, to all such claims against his client as the Taxing Master has a right to consider, and if necessary moderate. This definition will be found, I think, to work extremely well in practice.

As regards the second point, the subject of the loss of lien by taking security was well considered in *Cowell* v. *Simpson* (3).

(1) Page 551. (2) 2 Jac. & W. 214, 218. (3) 16 Ves. 275.

C. A. 1891 *In re* Taylor, Stileman, & Underwood. Kay, L.J.

Lord *Eldon* there, after referring to a lien on goods, says (1): "The exigencies of mankind requiring the goods to be delivered for consumption, the implication from an engagement for security of an engagement to deliver the goods without payment is necessary: otherwise from a promissory note, payable in three years, a contract must be implied, that the goods are to be retained during that period; destroying the other special contract. So, in this instance, if the solicitor says, he will not proceed in the business, and will not deliver up the papers, the consequence is, that he destroys the express contract to postpone payment for three years. Therefore, unless from the fact, that he has taken this security, you can imply, that he is to keep the papers three years, though the vital interests of the owner may depend on the possession of them, the implication is necessary, that he is to deliver them up, and rely on the other contract." Lord *Eldon* there relied on the fact that the promissory note was not payable for three years. In *Stevenson* v. *Blakelock* (2) Lord *Ellenborough* said (3): "It is unnecessary to canvass the doctrine in *Cowell* v. *Simpson* (4), inasmuch as there is a material distinction between that case and the present; for there the bills were running, and there was no reason to presume that they would not be duly paid in this case the bills have been refused payment. Assuming then, the position of the Lord Chancellor to be correct, here there is the further circumstance of the bills being dishonoured; which places this defendant in his original situation as to lien." In *Balch* v. *Symes* (5), Lord *Eldon* said: "Notwithstanding the Court of King's Bench has expressed a doubt, whether my decision was right in the case of *Cowell* v. *Simpson*, I still entertain the opinion, that an attorney who takes a security abandons his lien." This has been construed as laying down that a solicitor taking a security for his costs always abandons his lien; but Lord *Eldon* does not say that; he only said that he abode by his former judgment. I take it that the true rule is that stated by Lord Justice *Lindley*, that in every case where you have to consider whether a lien has been waived you must weigh all the circum-

(1) 16 Ves. 281.
(2) 1 M. & S. 535.
(3) 1 M. & S. 544.
(4) 16 Ves. 275.
(5) T. & R. 87, 92.

C. A. 1891 *In re* TAYLOR, STILEMAN, & UNDERWOOD. Kay, L.J.

stances of that particular case, and it is an important consideration that we are here dealing with a transaction between a solicitor and his own client. A solicitor has a duty to perform towards his client to represent to his client all the facts of the case in a clear and intelligible manner and to inform him of his rights and liabilities, and where you find a solicitor dealing with his client and taking from him such a security as was given in this case, not expressly reserving his right of lien, I quite agree that the inference ought to be against the continuance of the lien. In *Robarts* v. *Jefferys* (1) Sir *John Leach* held that a promissory note of the same kind as that in the present case took away the lien. I think, therefore, that Mr. *Cozens-Hardy* is right in his contention on both points, and that the order of Mr. Justice *Stirling* ought to be discharged and an order made according to the terms of the summons, as the Appellant does not desire to withdraw from the offer to pay the £20 12*s.* 9*d.* into Court.

Solicitors: *Mear & Fowler*; *Taylor, Stileman, & Underwood.*

H. C. J.

In re ARBIB AND CLASS'S CONTRACT.

C. A. 1890 NORTH, J. *Nov.* 1, 5. C. A. 1891 *Feb.* 10.

[1890 A. 109.]

Will—Construction—Condition—"Return to England"—Vendor and Purchaser—Conditions of Sale—Right of Vendor to rescind, "notwithstanding previous litigation."

A testator appointed *B.*, then residing in *Australia*, one of his executors and trustees, "if and when he shall return to *England*," and devised his real estates to his trustees upon the trusts of his will. *B.* returned to *England* eight years after the testator's death, for his health, and remained in this country six months, and then went back to *Australia*, without having proved the will or taken any part in the execution of the trusts:—

Held (affirming the decision of *North*, J.), that *B.* had fulfilled the condition by his residence for a substantial period in *England*; and that, in the absence of evidence that he had dissented from or disclaimed the trusteeship before his return, the trusteeship and the estates vested in him on his coming to *England*.

A vendor sold an estate under conditions of sale, one of which was, that

(1) 8 L. J. (O.S.) (Ch.) 137.

C. A.
1891
In re ARBIB AND CLASS'S CONTRACT.

if the vendor should be unable or unwilling to meet any requisition or objection, he might annul the sale and return the purchaser's deposit, without interest or costs, notwithstanding any previous negotiation or litigation. An objection to the title having been taken by the purchaser, the vendor took out a summons under the *Vendor and Purchaser Act* to decide the question, and judgment was given against him :—

Held, that it was too late for the vendor, after the judgment, to exercise his power of annulling the sale.

THIS was a vendor's summons taken out by *C. G. Class* and *H. J. Pennrich*, who had purported to sell freehold property in *London*, as trustees for sale under the will of the late *William Bucknall*, late of *Weighton Road, Anerley*, who died in 1877. The will was dated 1871. The testator, after describing himself as *William Bucknall*, late of *The Glen, Dartmouth Park, Forest Hill*, in the county of *Kent*, but now residing at *Weighton Road, South Penge Park, Anerley*, in the county of *Surrey*, gentleman, continued as follows: "I appoint my son, *Frederick Estcourt Bucknall*, now residing at *Port Adelaide, South Australia* (if and when he shall return to *England*); my son-in-law, *Carl Gustav Class*, of *Weighton Road* aforesaid; and my nephew, *Julian Arthur Wege*, of *Ore*, near *Hastings*, gentleman, executors and trustees of this my will"; and he devised "unto and to the use of my said trustees, their heirs and assigns, the following freehold hereditaments now belonging to me. . . ." The premises devised included property the subject of this summons. The freeholds mentioned were devised on trust for sale, with power for the trustees to postpone the sale. The trusts declared by the will were of a nature likely to last for a considerable period, involving the exercise of powers of management.

The will and a codicil, not affecting the question raised by this summons, were proved by *Carl Gustav Class* alone, power being reserved to *Frederick Estcourt Bucknall* to come in and prove if and when he returned to *England*.

Frederick Estcourt Bucknall was at the time of his father's death domiciled in *South Australia*; he resided at *Port Adelaide* with his wife and family.

On the 19th of April, 1879, he executed a power of attorney, in which he recited the devise in his father's will, and that it was not his intention at present to return to and reside in *Great*

Britain, and he appointed *C. G. Class* to be his true and lawful attorney for him, and in his name, as one of the trustees and executors of the said will, to conduct, manage, and negotiate all and singular the matters and things which concerned the execution of the said trusts, or the management, disposal, or conduct of the estate and affairs in such will declared and considered. This power of attorney, however, was never stamped, and was treated as void, and was never acted upon.

In the year 1885 *Frederick Estcourt Bucknall* was a member of the Legislative Assembly of *South Australia*. He came to *England* for his health under the advice of his doctor, with the consent of his constituents. His wife accompanied him; but the other members of his family remained in *Australia*. He resided in *England* for six months, and then went back to *Adelaide*, where he had ever since resided. While he was in *England* he did not act in the trusts of the will, but he did not disclaim.

By an indenture dated the 9th of February, 1886, made between *C. G. Class* and *H. J. Pennrich*, *C. G. Class*, in exercise of statutory power, purported to appoint *H. J. Pennrich* a co-trustee with himself under the testator's will.

C. G. Class and *H. J. Pennrich* sold the premises by auction, and they were bought by the Respondent, *Eugenio Arbib*, who paid a deposit on his purchase. The 8th condition of sale was as follows: "If any purchaser shall make and insist on any requisition or objection, either as to the title or conveyance, or any matter appearing on the particulars or these conditions, which the vendors shall be unable or unwilling to remove or comply with, the vendors shall, notwithstanding any previous negotiation or litigation, be at liberty, on giving such purchaser not less than ten days' notice in writing, to annul the sale, in which case, unless the requisition or objection shall have been in the meantime withdrawn, the sale shall at the expiration of the notice be annulled, the purchaser being in that case entitled to a return of the deposit, but without interest, costs, or compensation."

An abstract having been delivered, the purchaser made several requisitions, and, among other things, he objected that the

C. A. 1891 — *In re* Arbib and Class's Contract.

trustees of the will were, not the vendors but, *C. G. Class* and *Frederick Estcourt Bucknall.*

The summons asked for a declaration that a good title had been shewn.

The summons came on for hearing before Mr. Justice *North* on the 1st of November, 1890.

Grosvenor Woods, for the vendors:—

It is impossible that the testator can have meant that if his son should ever set his foot in *England* again he should become a trustee. If he were brought by stress of weather within the three-miles limit when on a voyage, or stayed a night in *England*, it could not be reasonably said that he had returned to *England*. The reasonable construction to put on the words "if he shall return" is to say that "return" means come to *England* with an intention of remaining at least for a considerable time. A mere temporary residence for a special purpose, uncertain in its duration, is not sufficient. There is a case, *In re Moravian Society* (1), decided by Lord *Romilly*, exactly in point in principle, where he held that the words "depart the *United Kingdom*" in a clause of disqualification, coupled with very strict language, not found here, to shew that any departure was enough, was held not to disqualify trustees who had gone abroad for a temporary purpose. It is to be noted that the trusts are such as were likely to continue over a period of years.

Bleby, for the purchaser:—

Frederick Estcourt Bucknall did, in fact, return to *England*, and reside for a substantial period of time. The Court cannot go into any question of his intention. The only question is whether the plain words of the testator are to have their natural and obvious meaning. Without attempting to draw an absolute line, it may be admitted that a mere happening to be in *England* for a day or two would not be considered, on the authority of the case before the Master of the Rolls, to satisfy the condition. In that case it would have been manifestly inconvenient, and might be said to be an outrage on common sense, to hold that new

(1) 26 Beav. 101.

trustees were to be appointed directly a trustee set his foot abroad. Here the trustee was in *England* a sufficient time to attend to his duties.

Grosvenor Woods, in reply.

North, J. :—

In my opinion here a good title is not shewn, and the contract cannot be carried out, because I think it is not open to me to say at present that *Frederick Estcourt Bucknall* is not a trustee of the will.

By the will the testator describes himself as late of "*The Glen, Dartmouth Park, Forest Hill*, in the county of *Kent*, but now residing at *Weighton Road, South Penge Park, Anerley*, in the county of *Surrey*, gentleman." Then in his will he goes on thus: "I appoint my son *Frederick Estcourt Bucknall*, now residing at *Port Adelaide, South Australia*, if and when he shall return to *England*," and two other persons whom he then names, "executors and trustees of this my will"; and he then devises property to them, not *nominatim*, but as executors and trustees, so that the question is, Who are executors and trustees under those words?

One of the three died before the testator. The two left were *Frederick Estcourt Bucknall* and *Carl Gustav Class*. The testator died in 1877, and *Class* for a long time was really the only trustee. The son was residing at *Adelaide* then, and is residing at *Adelaide* still; but in the year 1885 the son *Frederick Estcourt Bucknall* left *Adelaide* and came to *England*—it is said in consequence of ill-health—and he remained in *England* for six months. The question is, what effect his arrival here had in constituting him a trustee under this will.

Now the words of the will are: "I appoint my son *Frederick Estcourt Bucknall*, now residing at *Port Adelaide, South Australia*, if and when he shall return to *England*." Did he return to *England*, or has he returned to *England*? Yes. When is he to be trustee? When he returns to *England*. So that, strictly speaking, as soon as he arrived here, he had done all that was

C. A. 1891

In re ARBIB AND CLASS'S CONTRACT.

North, J.

necessary to bring him exactly within the terms of the testator's will, namely, "if and when he shall return to *England*."

But it is said, the testator did not mean that, but meant something else; that he contemplated his coming here to reside, and a good many other things may be suggested. It may be suggested, and indeed is suggested, that it does not mean coming within three miles of the shore of this country, but actually coming to this country and taking up his residence here; and, further, it is suggested, giving up his residence in *Australia* also. No doubt there are a good many contingencies that may be suggested; but I do not feel myself at liberty to go outside the words actually used, and the words are, "if and when he shall return to *England*." Without trying to split hairs upon such a matter as his spending four and twenty hours in *England* in passing through from one place to another, I think that when he comes here to reside for a certain time, not casually, but comes to stay here, and when he does stay here for some months, he has satisfied the words that he has "returned to *England*"—that it to say, has stayed here; I do not mean stayed permanently, but that he has come here, not casually, but in order to remain here for some considerable time, and he does remain for that period. He might, of course, have disclaimed, but nothing was ever done by him to disclaim; and therefore it seems to me that, when he did return to *England*, he satisfied the terms of the will. If I were to attempt to introduce words which are not to be found in the will, I should be at once involved in all sorts of questions as to what the testator meant; and in fact Mr. *Grosvenor Woods* has suggested one or two different things that might be meant, and a great many more might be suggested.

The only serious difficulty I feel is, from the fact that the Master of the Rolls (Lord *Romilly*) in the case of *In re Moravian Society* (1), seems to have put a different construction upon very similar words. There, by an indenture, dated in 1853, certain real and personal estates were conveyed by Mrs. *Bates* to seven trustees, upon trust, for the purposes of maintaining, supporting, and advancing the missionary establishments among heathen nations of the Protestant Episcopal Church,

(1) 26 Beav. 101.

known by the name of the *Unitas Fratrum*, or United Brethren, and towards the maintenance, support, and education of the children of ministers and missionaries of the said Church, educated at a place called *Fulner*, in the county of *York*. There the provision of the deed was, that if any or either of the trustees should depart the *United Kingdom*, from whatever cause or motive, or under whatsoever circumstances, every trustee so departing the *United Kingdom* should, immediately upon his departure, be and be considered as thereby discharged and disconnected from the trusts and duties by the said indenture created and imposed and (to put it shortly) from the office of trustee, and all duties, trusts, and confidences, and so on; and all estate and interest therein should immediately thereon be and be considered as, and should become, divested out of or extinguished as to him the said trustee on departing the *United Kingdom*, in like manner and in full and absolutely to all intents and purposes as if he were dead. Then the report says: "Two of the trustees (Mr. *Latrobe* and Mr. *Rea*) had both been temporarily absent from the *United Kingdom* while trustees."

"This was a petition for the appointment of new trustees, and for vesting the trust property."

"It was stated that the persons connected with the United Brethren who were the most fit to be appointed trustees were those who were most likely to go on frequent visits to the Continent and elsewhere in connection with the interests of their Church."

How far that operated upon the mind of the Master of the Rolls I do not know; but he decided as is stated here—the case is not very fully reported but is only put very shortly: "The Master of the Rolls was of opinion, that a trustee who might be temporarily absent from this country, without intending permanently to reside abroad, did not depart the *United Kingdom*, or vacate his trust, within the meaning of the trust deed, and he declared that no appointment of new trustees was necessary on the ground of such temporary departure." I see a very great deal of difficulty in saying what sort of departure would be consistent with the express words, "if any or either of the trustees should depart the *United Kingdom*, from whatever cause or

C. A. 1891 *In re* ARBIB AND CLASS'S CONTRACT. North, J.

motive, or under whatsoever circumstances," the trust should come to an end. However, the Master of the Rolls did consider that some casual temporary departure might not vacate the office. Well, whatever I might decide here, if there had been some casual departure, or some temporary arrival, I think that a man who comes here and stays for six months does not come within the principle of that case. I do not feel, therefore, that the decision in that case binds me on this occasion.

That being so, I come to the conclusion (construing the will as it stands) that Mr. *Frederick Estcourt Bucknall* is a trustee. I do not see what are the words which I must introduce, or where I am to get them from, if I am to depart from the will as it stands, and add to it something which the testator has not put down.

The result is, that, in my opinion, a good title has not been made.

D. P.

C. A.

The vendors appealed from this decision.

The purchaser took out a summons under the *Vendor and Purchaser Act*, asking for the return of the deposit which he had paid on the sale with interest, and for payment of the costs of investigating the title. On the 24th of November, 1890, the Judge made an order on the summons, ordering the amount of the deposit to be paid into Court, together with interest at 4 per cent. from the day of sale till the day of lodgment in Court; and that the vendors should pay to the purchaser's solicitors the costs of investigating the title, they undertaking to abide by any order the Court of Appeal might make with respect thereto. The vendors also appealed from this order.

The appeals were heard on the 10th of February, 1891.

Byrne, Q.C., and *Grosvenor Woods*, for the Appellants:—

The reasonable construction of the clause in the will is that *F. E. Bucknall* was not to be a trustee unless he returned to *England* for the purpose of residing there; a mere temporary visit is not sufficient: *In re Moravian Society* (1). Otherwise it would follow that he could become a trustee if he was driven by

(1) 26 Beav. 101.

stress of weather into an English port, or passed within three miles of the English coast. Moreover, he has never accepted the devise and has never acted in any way; and if the Court will give us leave to produce fresh evidence, we can shew that since the decision in the Court below he has executed a deed of disclaimer, which will date back to the death of the testator.

[*Cozens-Hardy*, Q.C., for the Respondent, opposed the reception of any fresh evidence, and the Court refused to allow it.]

The circumstances under which *F. E. Bucknall* came to this country shewed that he only intended to stay for a short time. He did not give up his seat in the Legislature of *South Australia*, but obtained leave from his constituents for a short absence.

We also appeal against the order for payment of interest on the deposit and the costs of investigating the title. The 8th condition of sale gives the vendors the power, in case they should be unable or unwilling to remove any objection to the title, to annul the sale, and to return the deposit without interest or costs, "notwithstanding any previous negotiation or litigation." The vendors claim that right still; and if this Court should affirm the judgment of Mr. Justice *North*, the vendors would at once give notice to the purchaser to annul the sale, and would return the deposit, without the costs of investigating the title. The order of the Judge prevents them from exercising this right.

Cozens-Hardy, Q.C., and *Bleby*, for the Respondent, were only called on to argue on the point raised by the second appeal:—

The Court had jurisdiction under the *Vendor and Purchaser Act* to make the order appealed from: *In re Hargreaves & Thompson's Contract* (1). The condition of sale referred to only refers to pending litigation. It was never meant to apply to a case where the matter in dispute had been concluded by a judicial decision determining that the vendor had no title. It is, therefore, too late to take advantage of that condition.

Grosvenor Woods, in reply.

(1) 32 Ch. D. 454.

C. A. 1891 *In re* Arbib and Class's Contract.

Lord Coleridge, L.C.J.:—

This is an appeal from a judgment of Mr. Justice *North*, on a summons under the *Vendor and Purchaser Act*, in which he refused to declare that the vendors had made a good title to the property sold.

My opinion is that the contention of the Appellants is untenable, and that the decision of Mr. Justice *North* must be upheld.

The principal question turns upon a very few words in the will of *William Bucknall*. The will was made in 1871, and the testator thereby appointed certain persons his trustees and executors, and among them he named his son *F. E. Bucknall*, whom he described as then residing at *Port Adelaide, South Australia*, "if and when he shall return to *England*." The very words of this clause shew that the testator knew that his son was living at *Adelaide* as his place of residence, and it is to be observed that he does not say if his son shall "reside in *England*," or if he shall "take part in executing the trusts of the will," but simply "if and when he shall return to *England*."

The testator died in 1877, and his will was proved by the Defendant *C. G. Class*, power being reserved to *F. E. Bucknall* to come in and prove the same. The third executor named in the will had died in the lifetime of the testator. In 1879, *F. E. Bucknall* executed what purported to be a power of attorney to *Class*, to act for him in the trusteeship, shewing that, although he was still living at *Adelaide* and incapable of personally undertaking the administration of the trust, he was anxious to take part in it so far as a non-resident in *England* could, and signed a document which he thought would enable *Class* to act as his attorney. Nothing more was done in the matter till the year 1885, when he returned to this country, and stayed here for about six months. There was power given by the will to the trustees to sell; and the question is whether *Bucknall* was a necessary party to the execution of this power of sale. He was so clearly, if by returning to *England* in the way I have mentioned he became a trustee of the will; he was not so, if what then happened did not make him a trustee. Mr. Justice *North* held that he did become a trustee, and we have to consider whether he came to a right conclusion.

There are two ways of looking at the question. It is said on the one side that it is a question of intention, and that if *Bucknall* came back not intending to take up his abode here, or only intending to stay for a short time, and if he went away without doing anything to shew that he accepted the trusts of the will, his having come in that way will not make the estate vest in him. It is contended that there must be some act of assent or acceptance of the office of trustee, and that there was no such act in the present case.

On the other side it was contended that it was not a question of intention. The words of the will are plain; the trusteeship and the estate are to vest in him "if and when he returns to *England*." It is admitted that if he had executed a disclaimer to prevent the estate from vesting in him before he returned to *England*, it would have been different; but he returned without having made any such disclaimer.

It appears to me that this is the correct view, for the testator, as I have pointed out, knew the difference between residing in a place and coming to it for a temporary purpose. Where the testator describes his son, he writes, "is residing at *Port Adelaide*;" but in the subsequent part of the clause he merely uses the expression, "return to *England*." If it were necessary to decide on the effect of his merely coming within three miles of the English coast, or merely going on shore at a port for a few hours, we might have held that that was not a return to *England* within the condition. But it is admitted that if he had come to *England* to remain for two years for the education of his children, it could not be said that he had not returned within the meaning of the clause. Therefore it seems to follow that it is after all a question of degree and good sense, and that all we have to determine is, whether substantial residence here for six months was a return to *England*. I think that it was, and that the trusteeship consequently attached to him and the estate vested in him, and that he was a necessary party to the conveyance.

It was suggested that his execution of the power of attorney shewed a disinclination to accept the office of trustee. I do not agree with that argument. In 1879 he did all that he could do, while in *Australia*, to shew that he did mean to act; he could

C. A. 1891 *In re* ARBIB AND CLASS'S CONTRACT. Lord Coleridge, L.C.J.

not get the estate vested in him then, because he had not returned to *England*; but it appears to me that the paper which he executed (whether it was a valid power of attorney or not), taken as evidence of intention, is overwhelming evidence that he wished to act as trustee under the will; and in my opinion that intention must be understood to continue till the time when he returned to *England*, and the estate vested in him. What happened afterwards can make no difference. Whether we admit the additional evidence of disclaimer which is now tendered, or take the facts on the evidence that was before Mr. Justice *North*, in either case I am of opinion that he was quite right in refusing to force an unwilling purchaser to take a title under a conveyance in which *F. E. Bucknall*, who was a necessary party, did not join.

But another question has been raised before us, under the 8th condition of sale, which was as follows:—[His Lordship read the condition, and continued:—]

It is said that although no notice has yet been given by the vendors, yet we ought to decide the case as if it had been given, because the vendors have still the right to give notice to annul the sale, and so escape payment of the costs of investigating the title. I do not agree with that view. In the first place, that point is now raised for the first time. It was not raised before Mr. Justice *North*, and we are now asked to decide it on the appeal. I do not think it is fair for the vendor to wait to see in what way the judgment would go and then to raise this point. But speaking for myself, I go further, and I say that on the construction of the condition which I have read, the state of things in the present case does not in my opinion come within the words of the condition. The meaning contended for may perhaps be extracted from them; but I think the fair meaning of the condition is that during the negotiation as to an objection, and pending litigation in Court, if the vendor does not think it worth while to struggle any longer, he may annul the sale; but it cannot fairly be held to mean that notwithstanding a dispute in a Court of Equity in which the whole question has been argued out, and a judgment has been given against the vendor, he can take his chance before the Court of

First Instance and the Court of Appeal, and possibly of the House of Lords, and because of the words "notwithstanding previous litigation" it should be in his power to avail himself of this condition and annul the sale. It is admitted that no such construction has ever been put upon this condition, and in order to accept it the Court must read "litigation" to be equivalent to "judicial decision." I do not think it can mean that.

Lord Coleridge, L.C.J.

The Appellants, therefore, fail in both their appeals, and they must be dismissed with costs.

Lindley, L.J.:—

I am of the same opinion. On the first point there is very little to be said. The co-trusteeship was devised to *F. E. Bucknall*, "if and when he shall return to *England*." I take the words in their ordinary sense. I do not say that if he merely came within three miles of the English coast, or if he came on shore for half-an-hour, that would be sufficient to comply with the condition. Perhaps it would not. But here he stayed in *England* for six months. In that time he might have done all that was necessary to wind up the trust. I think, therefore, the condition was sufficiently complied with. The next question is, Did the title vest in him on his return to *England*? *Primâ facie* it did, unless there was evidence that he had disclaimed it. It is not necessary to prove that a devisee has consented to a devise. That was laid down in *Standing* v. *Bowring* (1), where Lord Justice *Cotton* says (2): "Now, I take the rule of law to be that where there is a transfer of property to a person, even although it carries with it some obligations which may be onerous, it vests in him at once before he knows of the transfer, subject to his right when informed of it to say, if he pleases, 'I will not take it.'" That I apprehend to be old law, as old as *Butler & Baker's Case* (3). Was there in this case any dissent on the part of the devisee? I can see none. We are asked to allow evidence to be given of a disclaimer executed very recently. I do not think we ought to

(1) 31 Ch. D. 282. (2) 31 Ch. D. 288.
(3) 3 Rep. 26 b.

C. A. 1891 *In re* ABBIB AND CLASS'S CONTRACT. Lindley, L.J.

allow such evidence to be given. It is not to correct a mere slip; and its admission would open a wide field of fresh inquiry as to whether the disclaimer was sufficient, and we should have to consider the effect of the power of attorney which *Bucknall* executed in 1879. At present we have no evidence of disclaimer or dissent. It follows, therefore, that the title of the trustees who conveyed the estate is defective. This is a question of title; the defect might perhaps be set right; but we have no right to force the title upon a purchaser.

The other point relates to a different matter. The purchaser has obtained a decision from Mr. Justice *North* in his favour, and has taken out a summons to get back his deposit. The summons was opposed by the vendors on the ground that it was premature, because they were appealing against the judgment. The Judge ordered the deposit to be paid into Court, and further ordered the vendors to pay the costs of the investigation of the title. He had jurisdiction to make the order, and was right in making it, unless he was precluded by this condition of sale. But this condition was not brought to his notice, and he having made the order, we are now called upon to review his decision. In my opinion, the words of the condition, "notwithstanding previous litigation," will be satisfied by referring them to something less than an adverse judicial decision. If the vendors meant that after an adverse judicial decision they were to have power to annul the sale, they ought to have said so distinctly. I think the order was right.

KAY, L.J.:—

The testator made three persons executors and trustees of his will, taking notice that one of them was resident abroad. One of them died in the testator's lifetime; *Bucknall*, the one who had been abroad, returned to *England* in 1885, and remained for a time here. In February, 1886, the third trustee, *Class*, under a power given to the surviving trustee of the will, appointed another person, *Pennrich*, a trustee in the place of the deceased trustee, assuming thereby that he was the only surviving trustee of the will. The question is whether *Bucknall* was or was not a trustee. I will not repeat what has been said by the Lords

Justices; but the point may be put shortly thus: The contract was by *Class* and *Pennrich*, and it is a question whether they had power to make a contract at all. If they were not the trustees of the will it was a void contract, as it would be made entirely without authority. I think that upon the evidence we can come to no other conclusion than that when *Bucknall* returned to *England* in 1885, never having executed any disclaimer or given any intimation that he did not mean to accept the trust, but having, on the contrary, shewn by executing the power of attorney that he did intend to accept it, he must on his return to *England* be taken to have accepted it and to have the estate vested in him. In that view *Class* and the trustee appointed by him would have no power to make any contract. We are told that there is evidence that since the decision of Mr. Justice *North*, *Bucknall* has executed a disclaimer. I agree with the other Lords Justices that it would not be right to admit that evidence. But if we did, we should still have the fact of the execution of the power of attorney, which affords evidence that he intended to accept the trusts up to the time when he returned to *England*, and then his return would have vested the title, and it would be too late to execute a disclaimer.

On the second point, I also agree with the other Lords Justices. In *In re Hargreaves & Thompson's Contract* (1), it was decided that, under the words of the *Vendor and Purchaser Act*, 1874, which says that on an application in Chambers "the Judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid," the Court has power to decide what is to be done as to the costs of the investigation of the title. On the first of the applications in the present case, where the only question was whether the vendor could make a good title, nothing was said in the order as to who should pay the costs of investigating the title. Then a subsequent summons was taken out under the Act to deal with the deposit which was in the hands of the vendors, and the Judge ordered that *Class* and *Pennrich* should pay to the purchaser the costs of investigating the title. It is not denied that this order was within the jurisdiction

(1) 32 Ch. D. 454.

C. A. 1891 *In re* ARBIB AND CLASS'S CONTRACT. Kay, L.J.

of the Court, as established by *In re Hargreaves & Thompson's Contract* (1). When that order was obtained, it was not argued that because of a condition of sale which would have given the vendors the right to return the deposit without costs, a similar order ought then to be made. The payment of the costs was not resisted upon the right which the vendors had to annul the contract, but upon the ground that the vendors had appealed and the decision of Mr. Justice *North* might be reversed. But now the vendors, not having convinced us that the decision as to the title was wrong, ask to be released from the subsequent order on the ground of the condition of sale. I agree with the Lord Chief Justice and Lord Justice *Lindley* that the condition which allows the vendors to rescind the contract notwithstanding previous litigation cannot apply to such a state of things as has happened here. It must mean notwithstanding litigation pending, not litigation decided adversely to them. If we were to apply it to a case where the vendors wait for the judicial decision of the question, and it is decided against them, we should read it as if the words were "notwithstanding previous litigation and judgment against them." I agree that both the appeals must be dismissed with costs.

Solicitor for the vendors: *J. M. Mitchell.*
Solicitors for the purchaser: *Wild & Wild.*

(1) 32 Ch. D. 454.

M. W.

COX *v.* BENNETT.

C. A.
1891
Feb. 25, 26.

[1867 C. 217.]

Married Woman—Suit without Next Friend—Restraint on Anticipation—Arrears of Income—Married Women's Property Act, 1882, *s.* 1, *sub-s.* 2; *s.* 19.

Where costs are ordered to be paid by a married woman, suing under the *Married Women's Property Act*, 1882, without a next friend, payment of them can be enforced against any separate property to which she is entitled free from restraint on alienation at the time when the order to pay costs is made, and not only against separate property to which she is so entitled at the time when she commences the proceedings.

Where a married woman entitled under a will to income given to her separate use, with a restraint on anticipation, without fixing any days of payment, was ordered to pay to the trustees the costs of certain proceedings taken by her without a next friend :—

Held, that the trustees ought to be allowed to retain these costs out of a balance of income which was in their hands at the time when the order to pay costs was made, though it was not in hand at the time when she commenced the proceedings, the restraint on anticipation having ceased as to any sums forming part of the income so soon as they came to the hands of the trustees, and that this was not altered by the fact that by an order made in a suit for administering the estate she was prevented from calling for payment of these sums till a later period.

The decision in *In re Glanvill* (1) that only such estate is liable as the married woman is entitled to when she commences the proceedings does not apply where the proceedings are taken under the *Married Women's Property Act*, 1882, without a next friend.

Decision of *Kekewich*, J., affirmed.

UNDER the will of her father, *William Tomlin*, Mrs. *Midwinter* was entitled for life to the income of certain parts of his real and personal estate for her separate use, with a restraint on anticipation. In July, 1868, a decree was made for administration of the testator's estate. By an order on subsequent further consideration, dated the 22nd of April, 1882, it was ordered (*inter alia*) that the trustees should be at liberty to pay to Mrs. *Midwinter* upon her separate receipt out of moneys in their hands £125 on each of the following days in each year—viz., the 25th of March, the 24th of June, the 29th of September, and the 25th of

(1) 31 Ch. D. 532.

C. A. 1891 Cox v. Bennett.

December. The accounts of personal estate and of the rents and profits of the real and leasehold estates were to be continued, and the balances certified at intervals of twelve calendar months; and it was directed that after each yearly account had been taken the trustees should be at liberty to pay to Mrs. *Midwinter* the net balance, after deducting a certain share of costs and retaining enough to pay outgoings for the following quarter.

In 1890, Mrs. *Midwinter* commenced an action (without a next friend) in the Queen's Bench Division against the trustees to recover moneys amounting to £840, which had been paid to her husband out of her income with her assent from time to time. Mr. Justice *Day*, on the 14th of May, 1890, stayed the action that the application might be made to the Court in the administration suit. Mrs. *Midwinter* thereupon, without a next friend, took out a summons in that suit, asking that the trustees might be ordered to pay her the £840. This summons was adjourned into Court, and on the 16th of July, 1890, was dismissed, no order being made but that Mrs. *Midwinter* should pay the trustees their costs of the application and the adjournment into Court. "And it is ordered that execution be limited to the separate property of the Defendant *Laura Midwinter* not subject to any restraint against anticipation, unless by virtue of sect. 19 of the *Married Women's Property Act*, 1882, such property shall be liable to execution notwithstanding such restraint."

On the 12th of August, 1890, an order was made dismissing with costs the action commenced in the Queen's Bench Division, with a similar limitation as to execution.

On the 16th of July, 1890, the trustees had in their hands in respect of the net income of Mrs. *Midwinter*, £304 2*s.* 8*d.*, and before the 12th of August they received a further sum of £55 3*s.* 7*d.*

On the 30th of October, 1890, the trustees took out a summons, asking that they might be allowed to retain out of the £304 2*s.* 8*d.* the costs directed to be paid to them by the order of the 16th of July, 1890, and to retain out of the £304 2*s.* 8*d.* and £55 3*s.* 7*d.* the costs directed to be paid to them by the order of the 12th of August, 1890.

After this summons had been taken out the costs payable

under the order of the 16th of July, 1890, were taxed at £200 13*s.* 8*d.*, and those under the order of the 12th of August, 1890, at £15 5*s.* 8*d.*, so that the £304 2*s.* 8*d.* was more than sufficient to pay the whole.

The summons was adjourned into Court; and on the 21st of January, 1891, Mr. Justice *Kekewich* giving liberty to the trustees to retain out of the £304 2*s.* 8*d.* the £215 19*s.* 4*d.* costs, and the taxed costs of the present application.

Mrs. *Midwinter* appealed.

Mulligan and *Watt*, for the Appellant:—

We say, first, that there could not be any arrear until after the time of payment under the order of the 22nd of April, 1882. Mrs. *Midwinter* could not call for payment till then, and the restraint on anticipation continued. The Respondents relied on *D'Oechsner* v. *Scott* (1), but that case turned on the peculiar words of the will as to the indemnity of the trustees. The act on which the right to costs depends was done once for all on the issue of the summons and writ; and the separate property which Mrs. *Midwinter* had at that time can alone be looked to: *In re Glanvill* (2). *Hyde* v. *Hyde* (3) is quite consistent with *In re Glanvill*, and does not help the Respondents. The *Married Women's Property Act*, 1882, does not affect the case, for by sect. 19 the effect of a restriction on anticipation remains unaltered. The case, therefore, is left on the law as settled by *Pike* v. *Fitzgibbon* (4). The restraint on anticipation can in no way be evaded: *Stanley* v. *Stanley* (5).

Renshaw, Q.C., *Bramwell Davis*, and *R. Winslow*, for the Respondents:—

These were arrears of income which Mrs. *Midwinter* could deal with. The restraint on anticipation must arise from the will not from the Court. That the Court for convenience of administration ordered four quarterly payments on account on specified days, and directed the trustees to retain the balance to the end

(1) 24 Beav. 239.
(2) 31 Ch. D. 532.
(3) 13 P. D. 166.
(4) 14 Ch. D. 837.
(5) 7 Ch. D. 589.

C. A. 1891 Cox v. Bennett.

of the year, does not prevent the sum in hand from being arrears which Mrs. *Midwinter* could alienate, subject to any liability for outgoings. The Court could not create a new restraint on anticipation. As to *In re Glanvill* (1) it was not a case under the *Married Women's Property Act*, and decides nothing as to the effect of the Act, and the Judges there expressly reserve that question. Sect. 1, sub-sect. 2, provides that costs recovered against a married woman shall be payable out of her separate estate; and these words in their natural sense must, at all events, include all separate property free from restraint on anticipation to which she is entitled at the time when the order for costs is made, if indeed they do not include all separate property to which she is entitled when execution issues; a point which the circumstances of the present case make it unnecessary to argue. This is the only conclusion in accordance with natural justice.

Mulligan, in reply, referred to *Whittaker* v. *Kershaw* (2).

Feb. 26. Lindley, L.J.:—

This is an appeal from an order made by Mr. Justice *Kekewich*, authorising the trustees of a will under which Mrs. *Midwinter* is entitled to income to her separate use without power of anticipation, to retain and pay certain costs which they had incurred in the execution of the trusts, and which costs she had been ordered personally to pay.

There were two orders affecting her. One was an order dated the 16th of July, 1890, by which a summons taken out by her without any next friend, under the provisions of the *Married Women's Property Act*, 1882, which entitles her to sue in that way, was dismissed with costs. She was ordered to pay the costs with the usual provision limiting execution to separate estate not subject to any restraint on anticipation: "And it is ordered that execution be limited to the separate property of the Defendant, *L. Midwinter*, not subject to any restraint against anticipation, unless by virtue of sect. 19 of the *Married Women's Property Act*, such property shall be liable to execution notwithstanding such restraint." The other was a judgment against her, dated the

(1) 31 Ch. D. 532. (2) 45 Ch. D. 320.

12th of August, 1890, when a certain action instituted by her, also in her own name and without any next friend, was dismissed with costs in the same way.

Now, at the time those orders were made, the trustees had in their hands certain arrears of the income which was settled upon her for her separate use, and which arrears are more than sufficient to pay the costs which she has been ordered to pay. Under those circumstances, Mr. Justice *Kekewich* made the order which is appealed from, giving the trustees liberty to retain out of the sum of £304 2*s.* 8*d.*, being the balance in the hands of the trustees in respect of the rents and profits accrued due up to the 16th of July, 1890, of certain property held on trust for her, the costs which she had been ordered to pay; the amount of which I need not specify.

Mrs. *Midwinter* has appealed from that order, and Mr. *Mulligan* says it is wrong, inasmuch as it affects property as to which she is restrained from anticipation. He puts it in this way—that the time to which we ought to direct our attention is—not the time when the order for payment of costs was made, but the time when the legal proceedings in the course of which it was made were instituted, and that at that time it does not appear that there were arrears that could be attached. He relies in support of that argument, on *In re Glanvill* (1) and upon sect. 19 of the *Married Women's Property Act.* Since this case was argued yesterday, I have looked at *In re Glanvill* a little more closely. It appears to me that that case and the reasoning on which it is based do not apply to the present case at all. In the first place, in the case of *In re Glanvill* no proceedings had been taken by the lady under the Act. She sued by her next friend. In the second place, there was no order on the married woman to pay the costs. In the third place, the order of Vice-Chancellor *Bacon,* which was appealed against authorized the trustees to retain the costs out of future accruing separate estate, and to that extent it was obviously wrong. But there was this further point raised in that case. There was a small sum of £36, which was said to be arrears, and it was contended that this might be impounded or retained by the trustees. But when we look at the judgments we

(1) 31 Ch. D. 532.

C. A. 1891 Cox v. Bennett. Lindley, L.J.

find that this small sum of £36 accrued after the order on further consideration, which did not order her to pay the costs, but ordered her next friend to pay them, and the Court there came to the conclusion that even that sum could not be attached. There is language in the judgment that goes the length of intimating an opinion that the only arrears that could be attached were arrears that had accrued at the time of the institution of the suit. The main controversy was obviously not about that £36, which was merely a small item in the matter; the main controversy was the propriety of the Vice-Chancellor's order entitling the trustees to retain the costs out of the subsequent income of the married woman, as to which she was restrained from anticipation.

In *Hyde* v. *Hyde* (1) the Court of Appeal in dealing with a sequestration, allowed the sequestrator to attach and take in execution the arrears of a married woman's separate estate which were due at the time the sequestration issued, and they made no reference there as to any earlier time.

But, apart from that, it appears to me that what we have to deal with is not the case of *In re Glanvill* (2), but the *Married Women's Property Act*. I confess I am not at all disposed to extend the decision in *In re Glanvill* to a case which arises under that Act, for several reasons. In the first place the Court itself, in *In re Glanvill*, declined to say what would be right in a case arising under the Act. Lord Justice *Fry* is pointed upon that. He says (3): "The action was begun in 1882 before the passing of the *Married Women's Property Act*, 1882. How the case would have stood if the plaintiff had been suing without a next friend under the provisions of that Act I give no opinion: the question is one of some difficulty, and is not now before us." That is precisely the question which we have to deal with. The *Married Women's Property Act*, sect. 1, enables a married woman to sue without a next friend; and what is far more important, to my mind, is this, that the Act departs from the principle upon which *Pike* v. *Fitzgibbon* (4) was decided, and which was taken as the foundation of the decision in *In re Glanvill*. The Act, as I understand it, alters the whole law as laid down in *Pike* v.

(1) 13 P. D. 166.
(2) 31 Ch. D. 532.
(3) 31 Ch. D. 540.
(4) 14 Ch. D. 837.

C. A. 1891 Cox v. Bennett. Lindley, L.J.

Fitzgibbon (1). Looking at the Act, we find ourselves face to face with this difficulty. Supposing a married woman avails herself of the provisions of the Act by instituting proceedings at law or in equity without a next friend, and is ordered to pay costs; and supposing at the time of the institution of those proceedings she has no separate estate, but afterwards acquires separate estate free from restraint on anticipation, are the costs to remain unpaid? It appears to me not—that is to say, if you can find at any time arrears that can be attached, you may attach those arrears of the separate estate, although, of course, you cannot attach the future income which she is restrained from anticipating. In giving that effect to the Act, we are not in any way failing to give full effect to sect. 19, to which Mr. *Mulligan* referred. We are not in the least infringing the clause against anticipation—we are doing nothing more than taking arrears which she can deal with. That appears to me to be the true result of the Act of Parliament. I say nothing against *In re Glanvill* (2); it is clearly distinguishable from the present case. It was not a case depending upon the Act, and I certainly am not prepared to introduce what would be a startling state of things if we applied the decision to proceedings taken under the Act. The appeal must be dismissed.

Kay, L.J.:—

The difficulty in this case arises from the language used by the Judges of the Court of Appeal in the case of *In re Glanvill* (2). In that case an action by a married woman suing by her next friend had practically been dismissed with costs, and the question was, which part of her separate estate could be attached for the payment of those costs. Certainly all the Lords Justices concurred in saying that no part of her separate estate, except that which was free from anticipation at the date when the action was begun, not when the order for costs was made, could be attached to satisfy those costs. The case was peculiar in this respect. The action, as I have said, was by a married woman by her next friend, and therefore commenced before the *Married Women's Property Act*, which has made the use of a next friend

(1) 14 Ch. D. 837. (2) 31 Ch. D. 532.

C. A. 1891 Cox v. Bennett. Kay, L.J.

unnecessary. The order for costs was made, of course, against the next friend, but it in terms gave liberty to apply against the married woman if the next friend did not satisfy the costs, and it was under that liberty to apply that an application was made to have those costs paid. Now, between the time of the institution of the action and the time of making the order dismissing it with costs (or at any rate before the application was made under the liberty to apply), there had accrued some £36 of the income of the married woman, as to which she was restrained from anticipation; but it had become due to her, and therefore that sum, at the time of the application to the Court, constituted arrears of her income, and of course the fetter against anticipation was gone as soon as the income was payable to her. Therefore, if the date of the application to make her liable was the date to be looked to, those arrears at any rate would have been arrears that could have been attached. But the Lords Justices distinctly said, No, we must not look at that date, but we must look at the date when the action which was dismissed with costs was begun; and as this sum had not then accrued, and did not constitute arrears so as to be free from the fetter against anticipation, the Court has no power to make an order that the costs shall be paid out of the £36. That raises the difficulty in this case, and we took a little time to consider it further. Lord Justice *Lindley* has pointed out that this case differs from that in this respect, that here the action and summons, both of which have been dismissed with costs, were proceedings taken by the wife after the *Married Women's Property Act* had come into operation, and therefore without a next friend. Now the *Married Women's Property Act* says, in sect. 1, sub-sect. 2: "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant . . . . and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise." It does not in terms say that the costs and damages shall be pay-

able out of her separate property, although she may be restrained from anticipation, and therefore I do not mean to intimate that they could be so paid out of property which she is restrained from anticipating, nor do I intimate (the point is really not now before us) that her future separate property—I mean property coming to her after the date of the order for payment of costs—could be made liable. But the question here is whether income which had accrued after the commencement of the action, but before the order for payment of costs, could be made liable? At the time when the order for payment of costs was made there were arrears of income. There has been some question whether they could be properly called arrears of income, because it seems that, though under the will which gave the Appellant this income for her separate use without power of anticipation, no days of payment were fixed, the Court by an order in the administration of the estate has directed that a certain sum should be paid to her quarterly on given days out of the income, and that the residue of the income should be paid to her when the trustee passed his accounts at the end of the year, the object obviously being, for the convenience of administration, to let the trustee have something in his hands to pay for repairs and other outgoings. I have no doubt that, notwithstanding that order of the Court, there were arrears of income due to the wife, though under the order they would not be payable to her till some time after, and that this order cannot be read into the will so as to make the days of payment in the order equivalent to days of payment as fixed by the will, because it was merely for the purpose of convenience of administration that this order was made. Therefore, upon that point, I am clear that at the time when this order for payment of costs was made these were arrears of income due to the married woman, as to which, of course, the restraint on anticipation was gone—that is to say, to put the proper test, at the moment when these orders were made, she could for valuable consideration have charged the income, which was then actually in the hands of the trustees, and made an effectual assignment of it, notwithstanding the restraint on anticipation. If she could have done that, surely the essential justice of this case is that the order for the payment of costs should be

C. A. 1891 Cox v. Bennett. Kay, L.J.

executed against that fund. The costs are not incurred at the moment of bringing the action; they are incurred afterwards in the progress of the action. These were costs of her own trustees; they were incurred during the action, which, as the Court ultimately decided, was improperly brought, and ought to be dismissed with costs. It seems to me to be only just and right to say that those costs shall be paid not merely out of separate estate to which she was entitled at the time of bringing the action, but out of any separate property she was entitled to when the order was made. To try the question, it is only necessary to suppose she had at the time of bringing the action no separate property except that which she was restrained from anticipating, and that when the order for payment of these costs was made there were no arrears of that particular property at all, but that in the meantime she had become entitled to a large sum under some other will or settlement for her separate use, as to which she was not restrained from anticipation, would it be just and equitable to let her go free, and take that property as to which there was no restraint on anticipation away, and laugh at the trustees, and say, You shall not have those costs? Clearly not. It seems to me that the order, which was in terms that she should pay out of her separate property, excepting only that as to which she was restrained from anticipation, would apply to any separate property which was her's at the date when that order was made. I arrive at that conclusion from a consideration of what seems to me the natural justice of the case, and on principle. The only question is, whether the case of *In re Glanvill* (1) prevents our so holding. I do not think that it does, for the reasons which have been given by Lord Justice *Lindley*, in which I concur. That was a case, as the Lord Justice has pointed out, which did not come under the *Married Women's Property Act* at all, because the action had been commenced before the Act; and all the Judges carefully reserved any opinion as to what the decision in that case would have been if the action had been brought under the Act. I think, therefore, with the Lord Justice, that that decision ought not to be extended to a case in which the facts are such as they are here—viz., that

(1) 31 Ch. D. 532.

C. A. 1891 Cox v. Bennett. Kay, L.J.

an order has been made for payment by the married woman, limited only so as to prevent that payment being recovered against the estate as to which she was restrained from anticipation, and that this order ought to be treated as applying to all separate estate, which belonged to her at the date of the order, and as to which she was not restrained from anticipation. For these reasons I agree with the Lord Justice as to the order which he has directed to be made.

Appeal dismissed with costs. Liberty to retain costs out of any arrears of separate estate.

Solicitors: *R. T. Webster; Daniel Stock.*

H. C. J.

In re STANDARD MANUFACTURING COMPANY.

C. A. 1890 *Oct.* 30, 31; *Nov.* 1, 10. 1891 *Feb.* 10.

Incorporated Company—Winding-up—Debenture—Bill of Sale—Non-registration—Debenture-holders—Execution Creditors—Priority — Bills of Sale Acts, 1854 (17 & 18 *Vict. c.* 36) [*Revised Ed. Statutes, vol. xii., p.* 22], 1878 (41 & 42 *Vict. c.* 31) [*Revised Ed. Statutes, vol. xviii., p.* 651] *and* 1882 (45 & 46 *Vict. c.* 43), *s.* 17.

Debentures of a joint stock company, limited, creating a charge on the floating real and personal property of the company, are expressly excepted from the operation of the *Bills of Sale Act*, 1882, by sect. 17 of that Act.

The words "or other incorporated company" in that section are not to be construed as limited to companies *ejusdem generis* with mortgage or loan companies; but, even if so construed, any incorporated company which is authorized to raise money on loan or mortgage would, for the purposes of sect. 17, be *ejusdem generis* with "a mortgage or loan company."

Jenkinson v. *Brandley Mining Company* (1) dissented from.

The mortgages or charges of any incorporated company for the registration of which statutory provision has already been made by the *Companies Clauses Act*, 1845, or the *Companies Act*, 1862, are not, upon the true construction of the *Bills of Sale Act*, 1878, bills of sale within the scope of that Act.

The decision of the Vice-Chancellor of the County Palatine Court of *Lancaster* reversed.

APPEAL from the County Palatine Court of *Lancaster*.

The *Standard Manufacturing Company, Limited* (which was

(1) 19 Q. B. D. 568.

C. A. 1891 — *In re* STANDARD MANUFACTURING COMPANY.

originally named *William Hadwen & Co., Limited*), was constituted under the *Companies Acts*, 1862 to 1867, in the month of September, 1881, for the purpose of purchasing and carrying on the business of manufacturers of frillings, baby linen, and underclothing and the purchase and sale of cotton and other materials carried on by the firm of *William Hadwen & Co.*, at *Blossom Street, Manchester*. Its capital was £12,000, and under the last clause of article 60 of its articles of association, as subsequently altered by special resolution duly confirmed, the following borrowing powers were conferred upon the directors: "The directors may from time to time at their discretion borrow and reborrow as occasion shall require any sums of money for the purposes of the company on the mortgage bonds, debentures, promissory notes, bills of exchange, or other security of the company, at such rates of interest as they may deem advisable, but so that the whole amount of principal moneys so owing under this article shall not at any one time exceed the sum of £6000."

In exercise of their borrowing powers, the company, on the 8th of May, 1888, borrowed the sum of £1000 upon the security of twenty debentures of £50 each, ten of which were issued to *James Lowe*. The debentures issued to *James Lowe* bore date the 8th of May, 1888, and, so far as material, were in the following form, as were all the debentures of this issue:—

"The *Standard Manufacturing Company, Limited.*

"Issue of mortgage debentures not to exceed £4000, bearing interest at the rate of 6 per cent. per annum.

"No. 34. Mortgage debenture £50.

"The *Standard Manufacturing Company, Limited* . . . . will on the 1st of June, 1892, or on such earlier day as the principal moneys hereby secured shall become payable, in accordance with the conditions indorsed hereon, pay to *James Lowe* . . . or other the registered holder for the time being hereof, his executors, administrators, or assigns, the sum of £50.

"And the company will in the meantime pay interest thereon at the rate of 6 per cent. per annum by equal quarterly payments, on . . . in every year, the first of such quarterly payments to be made on the 8th of September, 1888.

"And the company doth hereby charge with such payments its undertaking and all its property both present and future.

"This debenture is issued upon and subject to the conditions indorsed hereon."

The conditions indorsed were, so far as material, as follows: By clause 2 the debentures of the series were to "rank *pari passu* as a first charge upon the property within mentioned," without any preference *inter se*. Clause 3 was as follows: "The charge created by the debentures shall be a floating security, and accordingly the company may, in the course of its business and for the purpose of carrying on the same, deal with the property hereby charged in such manner as the company may think fit, and in particular may sell the same, may pay and receive money, and may declare and pay dividends out of profits." Clause 4 empowered the company at any time to give notice to the holder of the debenture of their intention to pay off the same, and upon the expiration of a month after such notice the principal moneys secured should become payable. Under clause 5: if the company made default for one month in payment of interest on the debenture, the registered holder thereof might by notice in writing call in the principal moneys thereby secured, and in case such notice was duly given, "or in case any portion of the capital of the company uncalled at the date of this indenture shall be called up, or if an order of some Court of competent jurisdiction is made, or a special or extraordinary resolution is passed for the winding up of the company, the principal moneys hereby secured shall immediately become payable." Clause 6 empowered the registered holder at any time by one month's notice to call in the principal moneys thereby secured, and in that case such moneys should, on the expiration of the notice, become immediately payable. But in case any holder should take legal proceedings for enforcing his debentures against any of the property of the company, the whole of the moneys secured by the debentures then issued should immediately become payable. Under clause 7 the power given by clause 3 was to cease if default was made in payment of any principal moneys secured by the debenture, "or if any such order or resolution as aforesaid is made or passed"; and by clause 8: nothing in the debenture

C. A. 1891

In re STANDARD MANUFACTURING COMPANY.

contained was to authorize the creation of any charge on the property for the time being of the company in priority to the charge created by the debentures.

In November, 1888, the *Company* borrowed the sum of £4000 from the *Realization and Debenture Corporation of Scotland, Limited*, upon the security of forty debentures of £100 each, bearing interest at £7 10*s.* per cent. These debentures, which were all identical in form, were as to the first two clauses substantially the same as that issued to *Lowe*; and the remaining clauses were so far as material as follows: "and the company doth hereby as beneficial owner charge with such payments all its present and future stock, goods, chattels, and effects, and all its real property and interest in lands, and also all its present and future plant, machinery, stock (manufactured and unmanufactured), book and other debts, goodwill and assets, and generally all the present and future property, real and personal, and undertaking of the company: all of which premises of every kind above specified are intended to be included in the term property wherever used herein." Then followed a covenant by the company for further assurance to the corporation and declarations that the debentures of this issue were entitled to the benefit of, and subject to the provisions contained in a trust deed, dated the 3rd of November, 1888, and made between the company and the corporation, and that the debenture was issued subject to the conditions indorsed thereon, which the company covenanted to observe and perform. The conditions indorsed were, so far as material, as follows:—

Clause 3: "The debentures of this series shall rank *pari passu* as a first charge upon the property as within defined, and without any preference or priority one over another, and shall be a floating security, but no part of the property shall at any time hereafter and before payment in full of the whole of this issue of debentures be in any way charged or mortgaged by the company so as to rank *pari passu* with or in priority to the charge hereby created; nor shall any part of the real or leasehold property of the company be sold, transferred, alienated, or otherwise dealt with in any manner, without the consent in writing of the corporation first obtained: nor shall any part of the property of the company other than the said real or leasehold property be sold, transferred,

alienated, or otherwise dealt with in any way except in the ordinary course of the business of the company."

Clause 4 empowered the company at any time after the 1st of November, 1890, to pay off the debentures after six months' notice to the registered holder; clause 5 provided that the company should insure such of the property as was insurable. Clause 6 was as follows: "The principal moneys hereby secured shall become payable immediately on the happening of any of the events hereinafter specified, and on demand of payment by the registered holder thereof, and all right of the company to deal for any purpose whatsoever with any of the property shall forthwith cease." These events were (*inter alia*):—

"(*a.*) If the company makes default for twenty-one days in payment of any interest secured by this or any other debenture of this issue, whether the same has been demanded or not.

(*b.*) If the company makes default in the payment of any principal money. . .

(*c.*) If the company does not insure and keep insured the property. . .

(*d.*) If an order is made, or a . . . resolution passed for winding up the company.

(*e.*) If any execution, sequestration, extent, or other process of any Court or authority is sued out against the property of the company for any sum whatever."

And clause 7 provided that at any time after the principal moneys thereby secured should have become payable, or after a petition for winding up the company should have been presented or a resolution for winding-up should have been passed, or if judgment was recovered and enforceable against the company for any sum exceeding £100, and in certain other cases, the corporation might at their own instance appoint a receiver or receivers of any part of the property, and every such receiver should have power (*inter alia*) to take possession of, and to sell or demise any part of the property charged.

By the trust or covering deed of the 3rd of November, 1888, above mentioned, the company as beneficial owners demised to the corporation, thereinafter called the trustees, the leasehold, warehouses in *Blossom Street, Manchester*, wherein their business

C. A 1891 — *In re* STANDARD MANUFACTURING COMPANY.

was carried on, as a collateral security for the first mortgage debentures of the company for £4000, so that the trustees should have all the powers and privileges by the conditions indorsed on such debentures given to the receiver appointed thereunder; and powers were given to the trustees to concur with the company in selling or demising the hereditaments aforesaid.

The debentures and the trust deed were duly executed by the company; but none of such debentures were registered under the *Bills of Sale Acts*, nor was the trust deed so registered.

Between February, 1889, and the 27th of May, 1889, a number of persons obtained judgments against the company in the Queen's Bench Division, *Manchester* Registry, and in the Court of the Hundred of *Salford*, and handed writs of execution in respect of their judgment debts, in the one case to the sheriff of *Lancashire*, and in the other to the head bailiff of the *Salford* Hundred Court. These officers respectively took possession of the goods and chattels of the company: as to the sheriff, by virtue of the earliest writ handed to him, on the 27th of February 1889, and as to the head bailiff, by virtue of the earliest writ handed to him, on the 28th of March 1889; and they both remained in possession until after the company was ordered to be wound up.

On the 8th of March, 1889, *James Lowe* served the company with notice requiring payment of the moneys secured by his debentures, which notice expired on the 8th of April, 1889, and the company had not complied therewith at the date of the winding-up order.

On the 20th of May, 1889, Mr. *T. W. Gillibrand* took possession of the property, goods, chattels and effects of the company under an authority from the *Realization and Debenture Corporation of Scotland*, and as receiver on their behalf.

On the 27th of May, 1889, a petition was presented for the winding up of the company in the Chancery Court of the County Palatine of *Lancaster*, and a winding up order was made thereon by that Court on the 19th of June, 1889. By this order Mr. *J. P. Levy* was appointed to represent and attend the proceedings on behalf of the execution creditors, whose writs of execution were in the hands of the sheriff of *Lancashire* and the high bailiff of

the *Salford* Hundred Court respectively; and it was ordered that the sheriff and head bailiff should give up to the liquidator all property in their possession by virtue of any execution on a judgment against the company, and that this property of the company should be sold in the winding-up.

Under subsequent orders the assets of the company, except the book debts, unpaid calls, cash and leasehold interest in the premises in *Blossom Street*, were sold by Mr. *Gillibrand* and the liquidator, and a portion of the purchase-money having been paid into the Palatine Court in the winding-up, the question arose whether the debenture-holders or the execution creditors were entitled to priority of payment.

This summons was then taken out in the winding-up by Mr. *J. P. Levy* on the 19th of January, 1890, in order to obtain the decision of the Palatine Court as to the respective priorities of the debenture-holders and of the execution creditors of the company whose writs of execution were in the hands of the sheriff or of the head bailiff before the date of the winding-up petition.

The application came on for hearing before the Vice-Chancellor of the Palatine Court, and His Honour, in delivering judgment thereon on the 20th of May, 1889, said that he was unable to distinguish the case from *Jenkinson* v. *Brandley Mining Company* (1), where a Divisional Court, consisting of *Grove*, J., and *Huddleston*, B., held that the exception in sect. 17 of the *Bills of Sale Act*, 1882, was not in favour of debentures generally, but of debentures of mortgage or loan companies, or companies *ejusdem generis* with mortgage or loan companies, and His Honour, following that decision, held that these debentures were void for want of registration under the *Bills of Sale Acts*, and consequently that the execution creditors were entitled to be paid in full out of the assets of the company in priority to the debenture-holders.

The debenture-holders appealed.

Rigby, Q.C., and *Astbury*, for the Appellants:—

We contend that, as debenture-holders, we are entitled to the assets as against the execution creditors. The Vice-Chancellor decided against us on the ground of the construction which he

(1) 19 Q. B. D. 568.

C. A. 1891 *In re* STANDARD MANUFACTURING COMPANY.

considered to have been put by binding authorities on sect. 17 of the *Bills of Sale Act*, 1882 (45 & 46 Vict. c. 43). His Honour considered that these authorities bound him to read the words "any mortgage, loan, or other incorporated company," in sect. 17 as meaning "any mortgage, loan, or other incorporated company *ejusdem generis*."

[LORD HALSBURY, L.C.:—It seems possible to construe them as meaning any incorporated society which has power to borrow on mortgage.]

The view that the section means an incorporated company similar in nature to a mortgage or loan company makes it very extraordinary. A mortgage or loan company must mean a company whose business it is to lend money on mortgage or otherwise. Now such a company is eminently one which does not require the protection of this clause, for its property must consist of money and securities, and it never can have any material amount of chattels coming within the purview of the Act. The debentures in this case are a floating security until certain events happen which bring them into full operation. In the case of *In re Henry Pound, Son, & Hutchins* (1), the securities were very like those in the present case. A receiver had been appointed by the debenture-holders after an order for winding up the company, and the Court of Appeal ordered possession of the assets to be given to him. The Vice-Chancellor relied on *Jenkinson* v. *Brandley Mining Company* (2); but in that case the mortgage was admitted to be bad, and the debentures themselves did not purport to charge the property of the company, so the case was a clear one. Sect. 17 could by no possibility help the debenture-holders, and the observations of the Judges on its construction were extra-judicial. If a debenture is a bill of sale within the meaning of the *Bills of Sale Act*, 1878 (41 & 42 Vict. c. 31), and if a debenture of a company, not being a mortgage or loan company, does not come within the saving of the Act of 1882, s. 17, then it is left to the operation of sect. 8 of the latter Act and is altogether void, which is a very serious result, and cannot have been intended by the Legislature. In *Ross* v. *Army*

(1) 42 Ch. D. 402.

(2) 19 Q. B. D. 568.

and Navy Hotel Company (1)—the case of a company not at all like a mortgage or loan company—debentures purporting to charge the property of the company were held to be protected by sect. 17. In *Edmonds* v. *Blaina Furnaces Company* (2) a debenture of the company was held to be saved by the 17th section; and this was followed in *Levy* v. *Abercorris Slate and Slab Company* (3), *Jenkinson's Case*, which had been decided in the meantime, not being referred to. We believe there is not a shadow of authority against us except the *dicta* in *Jenkinson* v. *Brandley Mining Company* (4), and these were pointedly disapproved of in *Read* v. *Joannon* (5), which decides that a debenture of an incorporated company is not a bill of sale within the Acts at all, and that if it were it would be saved by sect. 17. The section that required bills of sale to be registered was sect. 8 of the Act of 1878; that has been expressly repealed by sect. 15 of the Act of 1882, and though it has been held that the repeal does not apply to absolute bills of sale, it has never been doubted that it applies to bills of sale given by way of security. Even, therefore, if this was an instrument which would have required registration under the Act of 1878, the repeal prevents its requiring it under that Act, and sect. 17 of the later Act prevents its being liable to registration under sect. 8 of the later Act unless the *ejusdem generis* view can be supported, which we say it cannot. The point is discussed in *Topham* v. *Greenside Glazed Fire Brick Company* (6), and the difficulty of saying what companies are *ejusdem generis* with mortgage and loan companies pointed out. The doctrine of restricting general expressions to things *ejusdem generis* with things specifically mentioned has not latterly been looked upon with so much favour as formerly.

[LORD HALSBURY, L.C., referred to *King* v. *George* (7).]

Neville, Q.C., and *Radford*, for the Execution Creditors:—

First of all, we say that these debentures are bills of sale within the *Bills of Sale Act*, 1878, and require registration as

(1) 34 Ch. D. 43.
(2) 36 Ch. D. 215.
(3) 37 Ch. D. 260.
(4) 19 Q. B. D. 568.
(5) 25 Q. B. D. 300.
(6) 37 Ch. D. 281, 291.
(7) 5 Ch. D. 627.

C. A. 1891 *In re* STANDARD MANUFACTURING COMPANY.

such; and that they are not taken out of that Act by the Act of 1882. If sect. 17 of the Act of 1882 was intended to apply to all incorporated companies, why were mortgage and loan companies mentioned?

[LORD HALSBURY, L.C.:—Then arises the difficulty of saying what companies can be *ejusdem generis* with mortgage and loan companies.]

Jenkinson v. *Brandley Mining Company* (1) is a decision in favour of the *ejusdem generis* construction. The Court went on two grounds, and their opinion on one cannot be treated as extra-judicial merely because the case might have been disposed of on the other ground alone. We say, then, that this being a company not *ejusdem generis*, sect. 17 does not apply, and the debentures are wholly void for want of registration under sect. 8 of the same Act. But if sect. 17 applies to debentures of all incorporated companies, then such debentures are taken out of that Act altogether, and are left liable to registration under the Act of 1878, sect. 8, which will serve our purpose just as well.

[BOWEN, L.J.:—Is not registration of debentures required by the *Companies Acts*?]

Yes; but such registration is not notice to all the world like a registration under the *Bills of Sale Act.* The register of mortgages by a company can only be inspected by members or creditors, and so does not give the publicity aimed at by the *Bills of Sale Acts.*

[LORD HALSBURY, L.C.:—Has it ever been decided that, under the Act of 1854 (17 & 18 Vict. c. 36) or under the Act of 1878, debentures of a company required registration?]

It never was decided that they did not till *Read* v. *Joannon* (2), and it was the general understanding that they did. The definition of a bill of sale is given by the Act of 1878, sect. 4, and debentures come within its words. They are instruments by which a right to a charge or security on personal chattels is conferred. Every mode of creating a charge on personal chattels is hit at by that section.

(1) 19 Q. B. D. 568. (2) 25 Q. B. D. 300.

[LORD HALSBURY, L.C.:—Does not the definition of personal chattels exclude the property of a company?]

No; the words "shares or interests in . . . or in the capital or property of incorporated or joint stock companies" refer to the interests of shareholders, not to the chattels belonging to the company, and which the company mortgages. *Attenborough's Case* (1) is against the exclusion suggested by the Court: *In re Marine Mansions Company* (2). In *Shears* v. *Jacob* (3) and *Deffell* v. *White* (4) the necessity for registration was assumed. If debentures are not within the Act of 1878, the 17th section of the Act of 1882 is pure surplusage; for there is nothing in that Act to make them liable to registration unless they were so under the Act of 1878. *In re Stockton Iron Furnace Company* (5) is negative evidence in our favour. *Topham* v. *Greenside Glazed Fire Brick Company* (6) goes on the footing that an assignment by a company is a bill of sale. In *Ross* v. *Army and Navy Hotel Company* (7) the question was between a debenture-holder and the company. If sect. 17 applies to these debentures, we do not say that they are void as against the company; but we do say that they are void as against us. That the debentures do not relate only to existing goods does not prevent their being bills of sale, as is shewn by the remarks in *Ex parte Hubbard* (8).

[LORD HALSBURY, L.C.:—The Court there appears to assume that power to seize chattels must be conferred by the instrument, or else it is not a bill of sale within the Act.]

A document to be a bill of sale must, no doubt, under sect. 3 of the Act of 1878, give power to seize or take possession: *Ex parte Close* (9); *Ex parte Hubbard* (10); but it is not necessary that the power should be conferred in express terms: it is sufficient if that is the effect of the instrument. Taking the analogy of the *Bills of Sale Act*, 1854, sect. 3 of the Act of 1878 is practically a re-enactment of part of sect. 1 of the Act of 1854; and

(1) 28 Ch. D. 682.
(2) Law Rep. 4 Eq. 601.
(3) Ibid. 1 C. P. 513.
(4) Ibid. 2 C. P. 144.
(5) 10 Ch. D. 335.
(6) 37 Ch. D. 281.
(7) 34 Ch. D. 43.
(8) 17 Q. B. D. 690.
(9) 14 Q. B. D. 386.
(10) 17 Q. B. D. 690, 701.

C. A. 1891 *In re* STANDARD MANUFACTURING COMPANY.

sect. 7 of the Act of 1854 is expanded into sect. 4 of the Act of 1878; so that many of the decisions under the Act of 1854 apply to cases under the Act of 1878. Under the Act of 1854, certain documents which did not contain any express power to seize were held to be bills of sale. In *Ex parte Mackay* (1) and *Ex parte Conning* (2), an agreement to execute a bill of sale, and operative as an equitable assignment, though containing no express power to seize, was held to require registration. So in *Edwards* v. *Edwards* (3), a deed by which the debtor covenanted that, if the debt was not paid by a given day, certain chattels should be charged with it, and that he would execute a mortgage of them, was held to be a bill of sale requiring registration.

[FRY, L.J.:—That was not a mere charge, but an agreement to assign, which would give a right to possession.]

In *Ex parte Montagu* (4) a letter purporting to transfer certain chattels was registered as a bill of sale, and was held to be an equitable assignment giving the right to possession. So, also, a charge operative as an equitable assignment requires registration.

[BOWEN, L.J.:—But has the chargee the right to take possession?]

The chargee can get possession by enforcing his charge, and it is not necessary that an express power to seize should be given by the instrument, if under it the chargee can get possession through a Court of Equity. After-acquired chattels pass by way of equitable assignment: *Holroyd* v. *Marshall* (5): so it cannot make any difference that future chattels are the subject of the security. A bill of sale of after-acquired chattels is as much within the mischief against which the Act of 1878 is directed as an assignment of present chattels.

[LORD HALSBURY, L.C.:—What you have to meet is, that sect. 3 of the Act of 1878 appears to confine a bill of sale to an instrument dealing with existing chattels.]

Sect. 6 treats an attornment giving a power of distress on

(1) Law Rep. 8 Ch. 643, 648.
(2) Ibid. 16 Eq. 414.
(3) 2 Ch. D. 291.
(4) 1 Ch. D. 554.
(5) 10 H. L. C. 191.

floating chattels as being a bill of sale of "any personal chattels" —not merely existing chattels—which may be seized under the power.

The assignment operates as soon as the property falls into possession. The fact that the debenture confers a power to sell the chattels comprised in it is sufficient to constitute it a bill of sale: *Climpson* v. *Coles* (1). With regard to the effect of the Act of 1882 upon debentures, *Pearson*, J., said, in *Attenborough's Case* (2), he saw no reason why the Act of 1878 should not apply to corporations as well as to individuals; but that could not be the effect of the Act of 1882, otherwise debentures in the common form would be inoperative, not being in the scheduled form of a bill of sale. The true view is that they require registration under the Act of 1878, but not under the Act of 1882, for the words "nothing in this Act," in sect. 17 of the latter Act, must mean "nothing in this Act of 1882"; so that the exception in sect. 17 does not apply to the Act of 1878 at all, "this Act" and "the principal Act"—of 1878—being clearly distinguished by sect. 3 of the Act of 1882, and, indeed, throughout that Act: *Swift* v. *Pannell* (3): *Ross* v. *Army and Navy Hotel Company* (4).

Upon principle, there can be no reason why companies should be exempted from the obligation of recording, for the protection of those who are about to give them credit, that they have given securities upon their chattels, or why they should have a greater privilege of mortgaging their chattels than individuals. We submit, therefore, that the Vice-Chancellor's decision is right, and that these debentures required registration.

But, secondly, assuming that the Court is against us upon the question of registration, and should hold that the debentures are valid though unregistered, we say that the debentures do not create such a charge in favour of the holders as to give them priority over the execution creditors. The question is, What are the rights as between the execution creditors and the debenture-holders—what is the effect of a floating security of this nature? We submit that the possession by the sheriff is antecedent to any right of the debenture-holders or their receiver; and that

(1) 23 Q. B. D. 465.
(2) 28 Ch. D. 682.
(3) 24 Ch. D. 210.
(4) 34 Ch. D. 43, 51.

C. A. 1891 *In re* STANDARD MANUFACTURING COMPANY.

possession by the sheriff enures for the benefit of all the execution creditors who put their writs into his hands during his possession. In short, the possession by the sheriff is prior to any possession on behalf of the debenture-holders. The debenture-holders have nothing more than an equitable right to the chattels comprised in their security until execution; but when the sheriff takes possession he acquires a legal right which is prior to the equitable right. A debenture-holder has, by virtue of his debenture, really only an inchoate right to the chattels charged: the debenture is a floating security—a security changing from day to day; and its nature is such that no right attaches to any property comprised in it until it is put into active operation by the debenture-holder, who then converts it from what may be termed a "dormant" security into an "active" security. Until the security is made "active" there is no charge.

[LORD HALSBURY, L.C.:—Putting aside the figurative expression "dormant," do you deny that the debenture has any operation until acted upon by the debenture-holder?]

Yes; there must first be a failure of the conditions as to payment of interest, &c., indorsed on the debenture. Floating securities of this nature are inoperative on the property of the company until they are "crystallized" or made active by the debenture-holders or some one on their behalf. The "charge" created by the debenture is a charge upon such chattels as may be in existence when the security is put into operation; and, notwithstanding the word "charge," there is no actual charge upon any specific chattel until the moment when the security is made effective. The whole object of a security of this kind is to leave the company unfettered in dealing from day to day with the chattels comprised in it.

[LORD HALSBURY, L.C.:—Then there is no security at all for the debenture-holders, and the execution creditors may come in.]

The company are at liberty to disregard the debentures: they do not affect the right of the company to dispose of the property in any way they think fit. Until the debenture-holder perfects

his security by putting it into active operation the dominion of the company over their chattels is absolute for the purpose of carrying on their business; they may even sell them. We say, therefore, that the execution creditor is entitled to take in execution the chattels in the possession of the company free from the equitable charge of the debenture-holders. *Joseph* v. *Lyons* (1) is a clear authority that a grant of future-acquired chattels confers only an equitable interest therein upon the grantee, and that if a third person, without notice of that interest, takes possession of them when they come into existence, he is entitled to retain them against the grantee.

[THE COURT:—It is well settled that an execution creditor takes subject to all the equities.]

We say that the legal estate passed by the seizure by the sheriff.

[LORD HALSBURY, L.C.:—The sheriff cannot, by seizing, get rid of the rights of third persons to which the property was subject when in the hands of the debtor.]

A floating security, such as a debenture, only binds the assets in existence at the time the mortgagee intervenes: *Tailby* v. *Official Receiver* (2); and here there was no such "intervention" until after the sheriff had taken possession. In *In re Florence Land and Public Works Company* (3), Sir *G. Jessel*, M.R., points out the absolute power of disposition vested in a company over its chattels, notwithstanding the issue of debentures.

[FRY, L.J.:—The observations of the Master of the Rolls are directly opposed to your contention; for he says that a debenture does create a charge, but gives a license to the company to carry on its business.]

In re Colonial Trusts Corporation (4), and *Wheatley* v. *Silkstone and Haigh Moor Coal Company* (5) are also authorities that the general floating security constituted by a debenture does not take effect upon specific property until it is actually put in force, which, in the present case, was subsequently to the seizure by the

(1) 15 Q. B. D. 280.
(2) 13 App. Cas. 523, 541.
(3) 10 Ch. D. 530, 541.
(4) 15 Ch. D. 465, 472.
(5) 29 Ch. D. 715, 724.

C. A. 1891

In re STANDARD MANUFACTURING COMPANY.

sheriff. Accordingly, we submit that the right of the execution creditors is prior to that of the debenture-holders.

[They also referred to *Willmott* v. *London Celluloid Company* (1), and *Engelback* v. *Nixon* (2).]

E. S. Ford, for the official liquidator.

Rigby, in reply :—

Limited liability companies are not within the operation or policy of the *Bills of Sale Acts*.

The mischief to the remedy whereof they have been directed is shewn by the preamble of the Act of 1854 (17 & 18 Vict. c. 36). It was that "persons" who had granted secret bills of sale of personal chattels had been able to keep up the appearance of being in good circumstances, and possessed of property of which the grantees in effect had the possession ; and that the creditors of the grantors were defrauded. In other words, such creditors had been led to give credit on the faith of property which they had seen in the possession of the grantor, while all the time it was not really his.

But when it is a question of giving credit to a joint stock company instead of an individual, the intending creditors do not want this protection, because, as regards companies within the *Companies Clauses Act*, 1845, and companies under the *Limited Liability Acts*, the Legislature has provided for them statutory protection of another character. Accordingly, while we find in the *Bills of Sale Act* of 1854 an intention to deal with individuals only, the whole purview of the Act of 1878 shews that incorporated companies are not included therein. The definition of "personal chattels" in sect. 4 excludes, in express terms "shares or interests . . . in the capital or property of incorporated or joint stock companies"; and shareholders have, it must be remembered, shares or interests in the capital, but none in the property of the company.

But take the general scope of the Act. In sect. 8 the main object is the avoidance of unregistered bills of sale as against trustees or assignees in bankruptcy. But companies are not and

(1) 34 Ch. D. 147. (2) Law Rep. 10 C. P. 645.

never have been within the operation of the bankruptcy laws, and when a company is wound up this Act has no operation in favour of the general creditors.

[LORD HALSBURY, L.C.:—Was not this point dealt with in *Brocklehurst* v. *Railway Printing and Publishing Company* (1)?]

[*Radford*:—It was argued in *Topham* v. *Greenside Glazed Fire-Brick Company*. (2)]

The point was taken in *John Welsted & Co.* v. *Swansea Bank* (3), where it was held by *Pollock*, B., that these debentures did not come within sect. 17 of the Act of 1882; and he added that to class them with bills of sale would be to sin against the spirit and words of the Act.

If the Legislature had intended the *Bills of Sale Acts* to apply to corporations, such Acts would have contained clauses applicable to windings-up, and affording protection not merely to execution creditors but also to the general body of creditors.

The mischief aimed at by the *Bills of Sale Acts* does not exist with regard to incorporated companies, because under sect. 43 of the Act of 1862 every limited company must keep a register open to the inspection of any creditor or member of the company, of all mortgages and charges affecting its property, and this under penalties from its directors and officers, and without affecting the securities.

The expression "Law relating to bankruptcy or liquidation," used in sect. 8 of the Act of 1878, obviously means "liquidation in bankruptcy," a term first introduced in sect. 125 of the *Bankruptcy Act* of 1869, the language used in sect. 1 of the *Bills of Sale Act* of 1854 being "the laws relating to bankruptcy or insolvency." The scheme of liquidation in the case of incorporated companies is totally different; the property of the company is not vested in the liquidator, and he acts not only for creditors but for contributories and for the company. It was held in 1867 that the official liquidator of a company was not within the *Bills of Sale Act*: *In re Marine Mansions Company* (4); *Re Asphaltic Wood Pavement Company* (5).

(1) W. N. (1884), p. 70.
(2) 37 Ch. D. 281.
(3) 5 Times L. R. 332.
(4) Law Rep. 4 Eq. 601.
(5) 49 L. T. (N.S.) 159.

C. A. 1891 — *In re* STANDARD MANUFACTURING COMPANY.

The whole scope of sect. 8 shews that the Legislature was only dealing with "persons" in the sense of individuals, and not with joint stock companies. This is also shewn by the interpretation clause, sect. 4, the provisions of sect. 10 as to the attestation of bills of sale, the requirement of sect. 12 as to the index of the "surnames" of the grantors, and the reference in sect. 20 to bankruptcy, and its silence as to winding-up. I admit, of course, that by a general rule "persons" may include corporations; and in the 19th section of the *Interpretation Act*, 1889 (52 & 53 Vict. c. 63), it is enacted that the expression "persons" shall, unless the contrary intention appears, include any body of persons corporate or unincorporate. But up to that time there was no such enactment, and the *Bills of Sale Acts* contain ample evidence of the contrary intention.

Coming to the Act of 1882, the 3rd section enacts that that Act is to be construed as one with the Act of 1878 "so far as is consistent with the tenor thereof." The construction of the Act of 1878 with regard to incorporated companies was unaltered by the Act of 1882, and, to remove all doubt, a declaratory enactment was inserted in sect. 17, the true effect and meaning of which is that the Act is not applicable to any debentures of any incorporated company whatever.

Feb. 10. The judgment of the Court, consisting of Lord *Halsbury*, L.C., and *Bowen* and *Fry*, L.JJ., was delivered as follows by

BOWEN, L.J.:—

The question we have to decide is whether both or either of the debentures before us, which are in fact debentures of a joint stock company limited, and which create a charge on the floating real and personal property of the company, are void for non-registration under the *Bills of Sale Acts*, 1878 or 1882, or either of such Acts.

So far as the *Bill of Sale Act* of 1882 is concerned, it seems to us that such debentures are expressly excepted from its operation by sect. 17.

We do not agree with the decision of *Grove*, J., and *Huddleston*, B.,

in *Jenkinson* v. *Brandley Mining Company* (1) that the words "or other incorporated company," are limited to companies *ejusdem generis* with mortgage or loan companies, whatever these last-mentioned companies may be; but even if it were otherwise, we think that any incorporated company which is authorized to raise money on loan or mortgage would be for the purposes of this section *ejusdem generis* with a "mortgage or loan company." We see no reason for doubting that the *Standard Manufacturing Company, Limited*, is an incorporated company within that section.

The next question to be solved is whether these debentures or either of them are bills of sale, and bills of sale to which the *Bills of Sale Act*, 1878, applies.

That these debentures are "agreements by which a right in equity to a charge or security on personal chattels is conferred," appears to be clear. But we are of opinion, nevertheless, that on the true construction of the Act of 1878, the mortgages or charges of any incorporated company for the registration of which a statutory provision had already been made by the *Companies Clauses Act*, 1845, or the *Companies Act*, 1862, are not bills of sale within the scope of the *Bills of Sale Act* of 1878.

It is impossible to follow chronologically the legislation about bills of sale without observing that until the passing of the Act of 1882 the express and avowed design of the Legislature had been to strike at the frauds perpetrated upon creditors by secret bills of sale. The title of the *Bills of Sale Act*, 1854, so states, and the preamble of that Act is as follows:—

"Whereas frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons, to the exclusion of the rest of their creditors. For remedy whereof," &c.

Such corporate bodies as were at this time in existence were not bodies in the habit of committing frauds of this sort; and, since corporations were not subject to the law of bankruptcy, that portion at all events of sect. 1 of the Act of 1854, which

(1) 19 Q. B. D. 568.

C. A. 1891 *In re* STANDARD MANUFACTURING COMPANY.

was for the protection of assignees in bankruptcy, could not be applicable to corporations. Indeed, the definition of "apparent possession," which is of the essence of the Act of 1854, is so framed as to shew that corporations were not actively at all events present to the mind of the draftsman who drafted the statute.

Prior to the Act of 1854, the Legislature had passed in 1845 the *Companies Clauses Act*, 1845, which provided, in the case of mortgages and bonds of companies authorized by their special Act to borrow, for a register to be kept of such mortgages and bonds, and enacted that such register might be perused at all reasonable times by any of the shareholders, or any mortgagee or bond creditor of the company, or by any person interested in such mortgage or bond without fee or reward.

Between the *Bills of Sale Act* of 1854, and the *Bills of Sale Act* of 1878, the *Companies Act* of 1862 was passed, which by sect. 43 provides for the registration by companies of the mortgages and charges specifically affecting their property. At the date of the *Bill of Sale Act*, 1878, debentures which charged the property of such companies were well known in the commercial world.

Having regard to the provisions already made by statute for their registration, such documents could hardly be described as secret, or as belonging to the class of documents by which frauds were perpetrated upon creditors by secret bills of sale. They are not really therefore within the mischief of the Act of 1878. We cannot think that the Legislature could have intended in the *Bills of Sale Act*, 1878, to have interfered by merely general words with such well-known commercial instruments, and it seems to us that the canon of construction laid down in *Stradling* v. *Morgan* (1), and cited by the Lord Chancellor in the recent case of *Cox* v. *Hakes* (2), may be invoked with regard to the present controversy: "From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and

(1) Plowd. 205 a. (2) 15 App. Cas. 506, 518.

those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded on the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion."

Neither the cause nor necessity for the *Bills of Sale Acts*, 1854 and 1878, nor a comparison of the various sections, drive us to the interpretation that such documents are included. We have said that a comparison of the various sections of the Act of 1878 does not lead to any other conclusion. We may even say that such a comparison fortifies the opinion at which we have arrived. Without going so far as to decide that no corporation can be under any circumstances within the *Bills of Sale Act*, 1878, we may point out that the language of sects. 4, 10, and 12 shews that the *Bills of Sale Act*, 1878, was not dealing specifically with corporations, although it may be that the language of sect. 3 is wide enough to include the bills of sale of a corporation—a view which has tacitly, as we are aware, been assumed in many decided cases to be correct. The language employed in these other sections is certainly not felicitous language to be applied in the case of corporations, and warrants, we think, the observation that the debentures of companies were not actively present to the mind of the draftsman of the Act.

The view that debentures like the present are not within the *Bills of Sale Act* of 1878 was that adopted by Baron *Pollock*, in the case of *John Welsted & Co.* v. *Swansea Bank* (1), and by Lord *Coleridge* and Mr. Justice *Wills* in the case of *Read* v. *Joannon* (2): see also *Edmonds* v. *Blaina Furnaces Company* (3) and *Levy* v. *Abercorris Slate and Slab Company* (4). We agree with this view, and we think that this appeal should, therefore, be allowed with costs both here and below, on the ground that

(1) 5 Times L. R. 332.
(2) 25 Q. B. D. 300, 302.
(3) 36 Ch. D. 215.
(4) 37 Ch. D. 260.

C. A. 1891 *In re* STANDARD MANUFACTURING COMPANY.

the mortgages or charges of any incorporated company for the registration of which other provisions have been made by the *Companies Clauses Act*, 1845, or the *Companies Act*, 1862, are not within the *Bills of Sale Act* of 1878. The Respondents, the execution creditors, must accordingly pay the costs both of the debenture-holders and the liquidator.

Solicitors: *Linklater, Hackwood, Addison, & Brown*, agents for *Boote & Edgar, Manchester; Bullock & Worthington, Manchester; Phelps, Sidgwick, & Biddle*, agents for *Sale Seddon & Co., Manchester.*

W. W. K.

In re GOVERNMENTS STOCK INVESTMENT COMPANY.

CHITTY, J.
1891
Feb. 28; *March* 5.

Company—Alteration of Memorandum—Objects—Main Purpose—Dissentient Minority—Duty of the Court—The Companies (Memorandum of Association) Act, 1890 (53 & 54 *Vict. c.* 62), *s.* 1, *sub.-ss.* 2, 4, 5, (*a*), (*b*).

The *Companies (Memorandum of Association) Act*, 1890, does not enable a company in general terms to alter its memorandum of association, neither does it confer a general power upon the Court to do so; but the alterations to be sanctioned are confined to those specified in sect. 1, sub-sect. 5.

Where the "main purpose" of a company was the investment in Government securities, an alteration in the memorandum, giving a power to invest in securities not guaranteed by Government, was refused at the instance of a minority of debenture-stock holders.

Though there are no outside creditors, and though the large majority of the shareholders and debenture stock holders are in favour of the proposed alteration, the Court will not necessarily confirm the special resolution, even though within the objects specified in sect. 1, sub-sect. 5, until it has carefully considered the interests of those shareholders and debenture-stock holders who do not appear to oppose the petition, and who have presumably left the question to the careful consideration of the Court.

Observations on the Act. Principles on which the Court should proceed in considering these applications, stated.

PETITION.

The *Governments Stock Investment Company, Limited*, was incorporated in 1871, with a nominal capital of £1,000,000, divided into 50,000 shares of £20 each, of which about £750,000 had been issued.

The memorandum of association, so far as material, stated the objects of the company to be:—

(1.) To receive money on deposit at interest.

(2.) To invest the money received from payments on shares, in the stocks or obligations of British, foreign, or colonial governments, states, provinces, or municipalities, or of railways, or other public undertakings, guaranteed by any British, Foreign, or Colonial Government, State, province, or municipality: Provided that not more than one-tenth part of all the money invested shall be invested in the stocks or obligations of any one Government, State, province, municipality, railway, or undertaking.

CHITTY, J. 1891 *In re* GOVERNMENTS STOCK INVESTMENT COMPANY.

(3.) To invest the money received on deposit, in making advances on any of the foregoing securities, or in purchasing in the same.

By a special resolution of the shareholders, passed on the 20th of October, 1890, and confirmed on the 6th of November, 1890, it was proposed to alter the memorandum by striking out clauses (2.) and (3.), and in lieu thereof to insert the following clause: "To invest or employ all or any monies raised or received by or under the control of the company, whether representing share, capital, or debenture stock, or monies raised or borrowed on security or deposit, or any monies otherwise in the hands or under the control of the company, by purchasing, lending, or otherwise investing in or upon" [the stocks, &c., as in clause 2] "or in or upon mortgages, mortgage debentures, debentures, bonds, debenture stocks, and other obligations, and preference stocks and preference shares of any corporation, company, or undertaking at home or abroad, and in or upon stocks of any trust or investment company or corporation." [Then came the proviso limiting the investments to one-tenth, as in clause 2.]

This special resolution had been passed unanimously, rather more than one-half the shareholders being represented at the meetings either in person or by proxy.

On the 1st of December, 1890, the company presented a petition, under the *Companies (Memorandum of Association) Act*, 1890, for the confirmation by the Court of the special resolution.

The only creditors of the company, as stated in the petition, were the holders of debenture stock, to the aggregate amount of £438,870, depositors amounting to £78,363, and the directors, officers, and servants of the company.

By the prospectus, under which the debenture stock had been issued, it was stated, that the stock was amply secured by "a capital of £750,000, invested in stocks of, or obligations guaranteed by, British, Foreign, or Colonial governments, States, provinces, or municipalities, and the investment of the debenture monies in similar stocks."

On the 31st of December, 1890, a circular notice was, by the direction of the Judge in Chambers, posted to all the debenture stock holders and depositors, setting out the special resolution,

informing them that the petition to confirm it would be heard on the 31st of January, 1891, and asking them to state for the information of the Court, on the form annexed to the circular, (which was to be returned to the Petitioners' solicitors before the 10th of January, 1891), whether they assented, dissented, or were neutral, and also warning them that any one desirous of opposing the order should appear at the hearing.

In reply to this circular, debenture stock holders to the value of £150,570 assented, £22,690 dissented, £51,405 were neutral, the balance amounting to £214,365, sent no answer at all. Of the depositors, one dissented, and was paid off before the petition was heard, £30,195 assented, £6493 were neutral, and the balance, amounting to about £40,000, sent no answer at all.

It appeared that since the presentation of the petition, the directors, under a sanguine anticipation that the Court would accede to the proposed alteration, had invested about £53,000 in securities not authorized by the memorandum as originally framed, though authorized by the memorandum if altered as proposed.

The petition now came on for hearing.

Farwell, Q.C., and *A. D. Maclaren*, for the Petitioners:—

Due notice has been given to all the debenture stock holders, and to every person whose interests will be in any way affected, in compliance with sect. 1, sub-sect. 2 (*a*). None of the depositors, the only creditors, object; and of the debenture stock holders, an overwhelming majority approve of the proposal, and only one for £800 takes the trouble to appear and oppose.

The main purpose of the company is, to obtain a fairly safe and high rate of interest by spreading its investments over a wide range of securities, and we can do this "more efficiently," within sect. 1, sub-sect. 5 (*a*), if the range of investments is made wider: in fact, we cannot successfully compete with other companies similar to ours but with wider powers of investment, unless we can get the alteration we now ask. The directors, as sensible men, may be trusted to exercise a proper discretion in the choice of investments. What we are asking for is "a new and improved means" of attaining the "main purpose" of the company within

CHITTY, J. 1891 *In re* GOVERNMENTS STOCK INVESTMENT COMPANY.

sect. 1, sub-sect. 5 (*b*). We admit that we do not come within sub-sects. (*c*) or (*e*); but we can combine this new business with the existing business, as provided by (*d*).

[CHITTY, J.:—Is this a "business" at all, after *Smith* v. *Anderson*? (1)]

As to the debenture stock holders, they are not "creditors entitled to object" within sect. 1, sub-sect. 2 (*b*).

R. B. Yardley, for a debenture stock holder for £800:—

The debenture stock was issued on the understanding that it it was to be secured by a large sum invested in stocks guaranteed by British and Colonial Governments. The "main purpose" of the company is to invest in Government stocks, and the debenture stock holders are entitled to object to the company being turned into an *omnium* investment company. The debenture stock holders and depositors, who have not appeared, or not answered the circular, must not necessarily be taken to have consented: *In re Patent Ventilating Granary Company* (2). At any rate, we are entitled to be secured by having the amount of the debentures deposited. The alterations proposed are not within any of the objects mentioned in sect. 1, sub-sect. 5, and the petition should be dismissed.

Farwell, in reply.

CHITTY, J.:—

This being one of the first cases under the *Companies (Memorandum of Association) Act*, 1890, I have been desirous that the question raised should be carefully and fully argued.

The Act now under consideration is not a general Act to enable companies, at their will and pleasure, to alter their memorandums of association, nor does it confer any such power upon the Court; but the alterations that are to be made in the memorandum, must be confined to those which are carefully specified in sect. 1, sub-sect. 5; and it is observable that that sub-section does not wind up with any general clause, such as, "in all other cases, where it may be just and equitable," to make the alter-

(1) 15 Ch. D. 247. (2) 12 Ch. D. 254.

ation. The section is confined to the definite matters which are there mentioned.

Now, this company's name is the "*Governments Stock Investment Company*," a name which, by itself, imports that investments are to be made in Government stock. [His Lordship then read the memorandum of association as above, observing that the term "*Governments*," in the corporate name, was used in a wide sense, so as to include municipal or local governments, and was not confined to what might be popularly known as British or Foreign Governments; and having read the special resolution, and pointed out that, both in it and in the original clause (2), there was a proviso limiting the company from investing more than one-tenth in any one class of securities, continued:—]

It is plain, therefore, that the memorandum, if the Court assents to this alteration, will authorize the company and its directors to invest in limited liability companies, in the preference stocks and preference shares of such companies, whether at home or abroad, and also particularly in the stocks of companies of a somewhat similar nature to this company itself, namely, upon any of the trust or investment companies or corporations which have, in recent years, come into existence. That is a singular departure from the objects specified in the memorandum as originally framed. Many of these trust or investment companies themselves hold various foreign stocks to a large amount; so that, although this company, as it stands at the present moment, could not invest more than one-tenth of its money in *Argentines* say, it might, if the alteration were made, keep an investment of one-tenth of its capital (if it has one to that extent) in *Argentines*, and then invest the rest of its capital, or a large proportion of it, in many of these trust companies who hold *Argentines* to a large extent; so that the fraction of one-tenth, even in that way, might be very largely exceeded.

Of course I have regard to the argument that Mr. *Farwell* put forward and pressed upon me—that the directors are sensible men, and, as men of business, would not be likely to do this kind of thing; but that is not the matter that I have to consider. I have to consider, not what the present directors may be, but what the future directors may be, and what, in the competition

CHITTY, J. 1891 *In re* GOVERNMENTS STOCK INVESTMENT COMPANY.

between these various companies, the directors might, in an evil hour, be persuaded to do, in order to shew better dividends than the other trust companies with which, according to the argument, this company is competing. It was part of Mr. *Farwell's* argument that this company could not compete with the other companies that have a wider scope for investments, or that it could not compete upon the same terms, and that it is at a disadvantage in the competition accordingly.

[His Lordship having referred to the amount of share capital issued, the fact that the resolution had been passed by a majority of more than half the shareholders, and having stated the figures shewing the values of the debenture stock holders and others who replied or did not reply to the advertisements and notices issued, observing that those who assented were holders of a very much larger amount than those who dissented, and having stated the terms of the prospectus on which the debenture stock was issued, and having commented on the investments of the £53,000 made by the directors pending the hearing of the petition as an indication of the manner in which the new form of investment would be used by the present directors, continued:—]

Now, in exercising my discretion I must have regard to the rights and interests of the members of the company, and any class of those members, as well as to the rights and interests of the creditors, and then I must also, before I confirm the resolution, be satisfied that the alteration falls within the 5th sub-section. That sub-section says: "The Court may confirm, either wholly or in part, any such alteration as aforesaid with respect to the objects of the company if it appears that the alteration is required in order to enable the company"—and then follow the five sub-sections under the first five letters of the alphabet giving instances in which the alteration may be made. That does not provide for cases where the company cannot get on without the alteration, but means that the alteration is "required" (in the language of the statute) to enable the company to do the things that are there specified. Now, the first (*a*), is, "to carry on its business more economically or more efficiently." Does the extending the range of the power of investment in the manner

which I have already described fall within that sub-section? Does it enable the company to carry on its business more economically? It cannot be contended that it does, or that it will. Will it enable the company to carry on its business more efficiently? I have heard an argument upon that, and I do not think that this case falls within the term "more efficiently." It would enable the directors, if they thought fit, to speculate to a wider extent than they are justified in doing under the memorandum as it stands; but I cannot see that that falls within the meaning of this sub-section, which has evidently been prepared with great care; and I do not consider myself at liberty to attribute a loose meaning to the language which the Legislature has used. At the same time, I should be very sorry to construe this statute (which is a beneficial one) in any narrow sense. In my judgment, this statute (as indeed all others) must be construed fairly. I hold that the company is not within sub-clause (*a*).

The next is (*b*): "To attain its main purpose by new or improved means." The word "purpose," it appears to me, is used there designedly. The term is not "object," which occurs in sub-section (*e*), and which occurs in the earlier part of the 5th sub-section. The Legislature, no doubt, was aware that, according to the way in which the *Limited Liability Act* has been worked, the framers of the memoranda of association insert sometimes, under letters which exhaust the alphabet, what they are pleased to call the "objects" of the company. You may get as to an hotel company, "The object of this company is to carry on the business of an hotel," and you may go down then from that, in a manner which will surprise the uninitiated, and find out what the hotel company may, according to the ingenious framer of the memorandum of association, do—things which I think would astonish any ordinary hotel keeper. I mention this merely by way of illustration, and I am satisfied that the Legislature had cases of that kind before it, and designedly avoided using the term "object."

Now, what is "the main purpose" of this company? Mr. *Farwell* said it was to invest. I thought, and still think, that he might as well have said that "the main purpose" of the company

CHITTY, J. 1891 *In re* GOVERNMENTS STOCK INVESTMENT COMPANY.

was (in the language of the 4th section of the Act of 1862) the "acquisition of gain."

It appears to me that the statement that the main purpose of this company is to make investments is far too wide. The main purpose of this company is to invest its money in Government stocks, in the sense which I have already explained; and, when I have once stated that to be my opinion, it follows that this case is not within (*b*), because no one could say that an alteration is required to enable the company to attain its main purpose (which is the investment in Government securities) by "new or improved means," being the investment in non-Government securities. I am satisfied that the case does not fall within (*b*). It has not been argued that it falls within (*c*) and (*e*), and it is not seriously contended that it does within (*d*).

The result is, that this case does not fall within the Act. But even if it did fall within the Act, I should be compelled to refuse to confirm the resolution; and for this reason—the debenture stock holders have taken their stock on the faith that this was a Government investment company, and I think that they are entitled to say that they will not have this company turned, as against their will, into an *omnium* investment company; and therefore, notwithstanding that there is a majority, and a very considerable majority, of the debenture stock holders in favour of the resolution, it would be my duty to refuse to confirm the resolution—not merely at the instance of a debenture stock holder who appears, but in the interest of those who do not appear and who have left the matter (as I know people in this position often do) to the care of the Court.

I make a similar observation too with reference to the large minority of the shareholders who are not in favour of the resolution. They, I think, I am entitled to infer, have left this matter to the discretion of the Court. Whether they have done so in fact or not, of course I do not pretend to know; but I think that the Act of Parliament itself has thrown the duty upon the Court of examining each case with care; and, in the result, after having examined the case with all the care I can, and with no disposition to thwart the directors and those members of the company and debenture stock holders who are desirous of making

the change, of whose good faith I am satisfied, I think that I ought not to assent to it.

Therefore I refuse the confirmation asked—which means, in other words, that I dismiss the petition with costs.

Solicitors: *Davidson & Morriss; Loftus S. Long.*

W. C. D.

In re DODSWORTH. SPENCE *v.* DODSWORTH.

[1885 D. 2421.]

Practice—Affidavit—Description of Deponent as "Gentleman"—Rules of Supreme Court, 1883, *Order* XXXVIII., *rr.* 8, 14.

The decision in *In re Orde* (1) does not justify the Central Office in refusing to file any affidavit in which the deponent is described only as "a gentleman."

MOTION.

In a joint affidavit made in the above-named administration action by two trustees and mortgagees, for the purpose of proving the balance due to them on their mortgage, one of the deponents was described as "a manufacturer"; the other, who was a solicitor, was only described as "gentleman." The clerk at the Central Office refused to file this affidavit on the ground that the description of one of the deponents as a "gentleman" was insufficient, and the Practice Master, relying on the decision of *In re Orde* (1), upheld this refusal.

Kenyon Parker, now moved, under Rules of Supreme Court, 1883, Order XXXVIII., rule 14, that the affidavit might be received and filed notwithstanding the alleged misdescription, and submitted that the Central Office in refusing to file the affidavit had assumed the right to take judicial notice of what ought to have been left to the Court, and that it had no right to refuse to file the affidavit, inasmuch as the deponent, a solicitor, was properly described as a "gentleman."

(1) 24 Ch. D. 271.

CHITTY, J. 1891 *In re* DODSWORTH. SPENCE *v.* DODSWORTH.

CHITTY, J.:—

I will allow you to file this affidavit. I do not read the case of *In re Orde* (1), in the Court of Appeal, as deciding that any affidavit, in which a deponent is described simply as "gentleman," ought not to be filed at all, but only that when the Court has, as in that case, to consider the question of the fitness of a proposed new trustee, the value and weight of the deponent's evidence ought to be supported by some further and better description than the somewhat vague term of "gentleman," that it may be able to judge whether his evidence as to the fitness of the proposed new trustee can be relied on. The case of *Re Horwood* (2), which is referred to in the Annual Practice (3), with that of *In re Orde*, was also a case of weighing the value of the evidence of fitness of a proposed new trustee, and comes to the same thing as *In re Orde*. I think those cases only held the description "gentleman" insufficient for the particular purpose of weighing the value of the deponent's evidence.

Solicitors: *Geare, Son, & Pease.*

W. C. D.

CHITTY, J. 1891 *Jan.* 23, 28, 29; *Feb.* 17.

PERRY *v.* EAMES.

[1890 P. 2193.]

SALAMAN *v.* EAMES.

[1890 S. 3569.]

MERCERS' COMPANY *v.* EAMES.

[1890 M. 2740.]

Ancient Lights—Crown Property vested in Trustees—Sale by Trustees—Prerogative of the Crown—Prescription Act (2 & 3 *Will.* 4, *c.* 71), *ss.* 1, 2, 3 [*Revised Ed. Statutes, vol. vii., p.* 223].

The general words in sect. 2 of the *Prescription Act* (2 & 3 Will. 4, c. 71) do not apply to an easement of light which is governed exclusively by sect. 3 and subsequent ancillary sections.

In 1820 the site of the old Bankruptcy Court in *Basinghall Street* was purchased by the Government out of moneys provided by Parliament, the

(1) 24 Ch. D. 271. (2) 55 L. T. (N.S.) 373.
(3) Page 668.

conveyance being taken to trustees for the Crown, which conveyance was confirmed by an Act passed in the 1st and 2nd Geo. 4, c. 115. In 1886 the site was sold to the corporation of the city of *London* by the Crown, and in 1890 it became vested in the Defendant under a building agreement with the corporation.

The Defendant, having commenced to erect buildings on the site which obstructed the access of light to windows in opposite buildings belonging to the Plaintiffs, these actions were commenced to restrain such building.

No prescriptive right to such access of light had been acquired prior to 1820 owing to the custom of *London*, which prior to the passing of the *Prescription Act* (2 & 3 Will. 4, c. 71), prevented the acquisition of such right, *Wynstanley* v. *Lee* (1); but the Plaintiffs claimed that such right had been acquired under sects. 2 and 3 of the *Prescription Act*:—

Held, that sect. 2 did not apply to light; that the Crown not being named in sect. 3 was not bound by it; that the prerogative of the Crown prevented the Plaintiffs acquiring any right to the access of light over the site of the Defendant's buildings, and that the actions accordingly failed.

ON the 23rd of April, 1820, the site of the late Bankruptcy Court in *Basinghall Street* having been purchased by the Government out of moneys provided by Parliament, was conveyed to five persons nominated by the Crown as trustees in fee in trust for His Majesty King *George* IV., and his successors to the intent and purpose only that certain buildings might be erected on the ground for the meetings of the Commissioners of Bankruptcy, and for the transaction of business in bankruptcy.

By an Act of Parliament passed on the 1st and 2nd Geo. 4, c. 115, the conveyance of the 23rd of April, 1820, was confirmed, and by the 4th section of that Act it was enacted that the ground and buildings to be erected thereon should thenceforth be vested in the five trustees therein named in trust for His Majesty, his trustees and successors, to the intent that the ground and buildings erected or to be erected thereon might for ever thereafter be used and applied for the purposes of the Court of Bankruptcy subject to such rules respecting the use thereof as the Lord Chancellor might make, and for no other purposes.

The buildings were shortly afterwards erected and used for the purposes mentioned in the Act.

By the *Bankruptcy Act*, 1849 (12 & 13 Vict. c. 106), s. 60, it was enacted that the piece or parcel of ground in *Basinghall Street*, and the building called the Court of Bankruptcy which

(1) 2 Sw. 333.

CHITTY, J.
1891
PERRY v. EAMES.
SALAMAN v. EAMES.
MERCERS' COMPANY v. EAMES.

had been erected thereon, should from thenceforth be, and the same were, thereby vested in the Commissioners of the Court for the time being in trust for the purposes of the Act.

By the *Bankruptcy Act*, 1861 (24 & 25 Vict. c. 134), s. 68, the same ground and building were vested in the Commissioners of Her Majesty's Works and Public Buildings, and it was enacted that the same should be appropriated to such purposes as the Lord Chancellor should direct.

The building was used for the purposes of the Court of Bankruptcy until the 13th of February, 1886, when, pursuant to a direction of the Lord Chancellor in exercise of the power conferred on him by the last-mentioned Act, it was sold and conveyed to the corporation of the city of *London*.

In the early part of 1890 the site of the Bankruptcy Court became vested in the Defendant under a building agreement from the corporation of *London*, and in March of that year the Defendant, having pulled down the court, proceeded with the erection of the buildings the subject of these actions.

In September and October, 1890, these actions were commenced for the purpose of restraining the Defendant from erecting any buildings of a greater height than that of the old buildings, and so as to darken any of the ancient lights of the Plaintiffs as the same were enjoyed previously to the pulling down of the old buildings.

In November, 1890, it was ordered with the consent of all parties that the hearing of the motions should be treated as the trial of the actions so far as the questions of law were concerned.

The question was whether the Plaintiffs could claim any prescriptive right to the access of light over the site of the old Bankruptcy Court prior to the year 1886, the court having been Crown property from 1820 to 1886.

Whitehorne, Q.C., and *W. F. Hamilton*, for the Defendant:—

From the year 1820 to 1886 the sole equitable ownership of the old Bankruptcy Court was in the Crown, and the legal estate was vested in the trustees named in the conveyance, and the Act and the prerogative of the Crown attached. The trustees were the servants of the Crown, and stood in the place of the Crown

as to prerogative. Lands and houses occupied by the Crown or by servants of the Crown for the purposes of the Crown are not liable to be rated: *Mersey Docks* v. *Cameron* (1); *Reg.* v. *McCann* (2), and that rule applies to this case. The Crown is not named in the 3rd section of the *Prescription Act*, and is not therefore bound by that section, the general rule being that the Crown is not bound by a statute unless expressly mentioned or referred to by necessary implication: *Ex parte Postmaster-General* (3); *Corporation of Weymouth* v. *Nugent* (4); *Chitty* on Prerogative (5).

The same rule applies, although in some of the sections of the *Prescription Act* the Crown is expressly named: *Corporation of Yarmouth* v. *Simmons* (6); *In re Oriental Bank Corporation* (7). Where the King has any prerogative, estate, right, title, or interest, he is not barred of them by the general words of an Act: *Magdalen College Case* (8).

At common law no prescription could be maintained against the King, and this privilege extended to his lessee (9).

The statute had not begun to run when we entered into possession.

The presumption of a right in the Plaintiffs from twenty years' undisturbed enjoyment of light is excluded by the custom of *London*: *Wynstanley* v. *Lee* (10).

Seward Brice, Q.C., and *Beaumont*, for the Plaintiff in the first action:—

The Crown is named in the 2nd section of the Act, and we submit that our right to light falls within the meaning of the term "or other easement" in that section, and we rely on Lord *Selborne's* remarks in *Dalton* v. *Angus* (11).

The 3rd section is not an independent section, but must be read with the 2nd, and taking the two sections together we submit that the Crown is bound.

(1) 11 H. L. C. 443, 508.
(2) Law Rep. 3 Q. B. 141, 145, 677.
(3) 10 Ch. D. 595.
(4) 6 B. & S. 22.
(5) Page 383.
(6) 10 Ch. D. 518.
(7) 28 Ch. D. 643.
(8) 11 Rep. 74 b.
(9) 3 Cruise, 2nd Ed. p. 506.
(10) 2 Sw. 333.
(11) 6 App. Cas. 740, 798.

CHITTY, J.

1891

PERRY v. EAMES.

SALAMAN v. EAMES.

MERCERS' COMPANY v. EAMES.

Assuming the Crown is not bound by the 3rd section, we say that the property was not Crown property, or at all events not Crown property within the prerogative of the Crown. It was public property having been purchased with public moneys.

Even if it were Crown property and the Crown is not bound by the 3rd section, we still say the Defendant cannot now take advantage of the right of the Crown. They referred to *Sharp* v. *St. Sauveur* (1); *Barrow* v. *Wadkin* (2); *Hawley* v. *Steele* (3); *In re Wood's Estate* (4).

Seward Brice, Q.C., and *Stokes*, for the Plaintiff, in the second action.

Byrne, Q.C., and *Butcher*, for the Plaintiffs, in the third action:—

The *Prescription Act* deals with legal rights altogether, there is nothing in the Act to shew that it deals with equitable rights; the position of a *cestui que trust* is not recognized, the rights are acquired as against a legal owner. The trusteeship must be regarded as a mere agency. The money was public money, and acquired for public purposes. There was no duty for the trustees to discharge, except as servants or managers of the Crown: *Kinloch* v. *Secretary of State for India* (5).

This is not a right which can be set up by an assignee of the Crown. The rating cases which have been cited only go to shew that if a statute makes an occupier liable to rates such occupier is not liable if he is a servant of the Crown.

The Crown is sufficiently named in a statute where an intention to include it is manifest, and we submit that although the Crown is not named in the 3rd section, yet the language of the 2nd section is wide enough to include the Crown: *Maxwell* on his Interpretation of Statutes (6). The Crown is bound by necessary implication, because the servient tenement is not mentioned in the 3rd section.

Previously to the conveyance of 1820 the right of light to our tenement had been acquired by prescription at the Common

(1) Law Rep. 7 Ch. 343.
(2) 24 Beav. 1.
(3) 6 Ch. D. 521.
(4) 31 Ch. D. 607.
(5) 7 App. Cas. 619.
(6) 2nd Ed. p. 165.

Law. When the Crown acquired its title to the site of the old Bankruptcy Court the site was already subject to the servitude of light.

[They also referred to *Staunforde* on the King's Prerogative (1); *Chitty* on the King's Prerogative (2); *Bracton* (3).]

Whitehorne, in reply.

1891. Feb. 17. CHITTY, J.:—

Since the close of the argument I have been furnished with a statement compiled with great industry by Mr. *Hamilton*, shewing in whom many of the public Government buildings in *London* are vested, and the public statutes by which they are so vested. From this paper, as well as from inquiries I have made on the subject, it appears that there are several Government buildings held in trust for the Crown under modern statutes. For instance, the General Post-Office is vested in the Postmaster-General, in trust for her Majesty. The decision in these cases has therefore an importance extending beyond the interests of the parties engaged in the litigation.

The Plaintiffs claim a right to access of light to their dwelling-houses over the site of the old Bankruptcy Court in *Basinghall Street*, in the city of *London*, subject only to the obstruction which was caused by that building. The site of the court was purchased in 1820, and the building was shortly afterwards erected thereon—the moneys required for the purchase and the erection of the building being provided by Parliament. On the 23rd of April, 1820, the site was conveyed to five subjects nominated by the Crown as trustees, and the conveyance was made to them in fee in trust for his Majesty and his successors and to the intent and purpose only that certain buildings might be erected on the said ground for the meetings of the Commissioners of Bankruptcy, and for transaction of business in bankruptcy. The conveyance was confirmed by the public statute 1 & 2 Geo. 4, c. 115—the 4th section enacted, that the ground and buildings should thenceforth be vested in the five trustees named in trust

(1) Pages 42, 43. (2) Pages 380, 382, 383.
(3) 1569, cap. 5, fol. 49.

CHITTY, J.
1891
PERRY v. EAMES.
SALAMAN v. EAMES.
MERCERS' COMPANY v. EAMES.

for his Majesty, his heirs and successors, to the intent that the ground and buildings erected, or to be erected thereon, might for ever thereafter be used and applied for the purposes and in the manner described in the Act (that is, putting it shortly, for the purposes of the Court of Bankruptcy), subject to such rules respecting the use thereof as the Lord Chancellor might make, and for no other purposes. By the 60th section of the *Bankruptcy Act*, 1849, the ground and building were vested in the Commissioners of the Court for the time being for the purposes of the Act. This left the Crown's title as beneficial owner unaffected. By the 68th section of the *Bankruptcy Act*, 1861, the ground and building were vested in the Commissioners of Her Majesty's Works and Public Buildings; and it was enacted that the same should be appropriated to such purposes as the Lord Chancellor should direct. This enactment also left the Crown's equitable title unaffected unless and until the Lord Chancellor directed that the property should be appropriated to some purposes other than those to which the property had been previously dedicated. Even apart from the trust for the Crown in the conveyance and the statute of Geo. 4, it cannot be doubted that where property is held for such public purposes as those described in the above Acts the equitable title is in the Crown. The building was used for the purposes of the Court of Bankruptcy until after the passing of the Act of 1861, and also until it was sold and conveyed in 1886 to the corporation of *London* pursuant to a direction of the Lord Chancellor in exercise of the power conferred on him by the 68th section of the Act of 1861. On the execution of this conveyance the Crown's title was divested. The Crown's title thus continued down to the conveyance in 1886. The Defendant claims under this conveyance. The result is that from 1820 to 1886, a period of sixty-six years, the legal estate was vested in trustees who were subjects and mere depositories of the legal estate, but the sole equitable ownership was in the Crown for the public purposes of the Acts; and during the same period the Crown had, by its ministers of justice and other officers, the sole and exclusive possession of the property.

The Plaintiffs claim the access of light under the 3rd section of 2 & 3 Will. 4, c. 71, the Act for shortening the time of

prescription in certain cases, which came into operation on the first day of Michaelmas Term, 1832. The Crown is not named in that section, but is named in the 1st and 2nd sections. Therefore, regard being had to the general rule that the Crown is not bound by a statute unless named, a very strong case arises for holding that the Crown is not bound by the 3rd section. It was, however, argued for the Plaintiffs that the Crown is bound by necessary implication, because the servient tenement is not mentioned in the 3rd section. I am unable to follow this argument. It is true that the servient tenement is not expressly mentioned in the section, although it is referred to by the words, "any local usage or custom to the contrary notwithstanding"—words which apply to the servient tenement only. But it appears to me to be a wholly immaterial circumstance whether the servient tenement is mentioned or not. It is not a circumstance from which any intention on the part of the Legislature to bind the Crown can be inferred, much less is it sufficient to raise a necessary implication or to support an irresistible inference of intention to bind the Crown. I hold, then, that the Crown is not bound by the 3rd section.

It was further argued for the Plaintiffs that the right to light falls within the meaning of the terms, "or other easement," in the 2nd section, in which the Crown is named; and in support of this argument the observations of Lord *Selborne* in *Dalton* v. *Angus* (1) were cited. But although Lord *Selborne* was of opinion that the right of support in the case of two adjoining buildings—a right he considered to be an easement not purely negative—fell within the 2nd section, he did not say that the negative right to light was within that section, nor is there anything in his observations to justify an argument that he held any such opinion. To whatever other easements the terms of the 2nd section may extend, it is, I think, clear that they do not include light. The statute places the acquisition of the right to access of light upon a footing entirely different from that on which it rests the other incorporeal hereditaments with which it deals. The right to light is dealt with exclusively by the 3rd section, and the subsequent ancillary sections, such as the 4th, which defines the period

(1) 6 App. Cas. 740, 798.

CHITTY, J. 1891 PERRY v. EAMES. SALAMAN v. EAMES. MERCERS' COMPANY v. EAMES.

of twenty years, and what is meant by interruption. The right to light as between subject and subject is acquired indefeasibly by simple enjoyment for the statutory period of twenty years without the statutory interruption, unless the enjoyment be by consent or agreement expressly made or given by deed or writing.

If the 3rd section is contrasted with the 2nd section, it will be found that the only reason that can be suggested for including light in the 2nd section is to bind the Crown. As between subjects, the 3rd section covers and more than covers all the ground of the 2nd section, and would be an unnecessary and superfluous enactment in regard to light. The language of the 2nd section ought not to be construed to include light merely for the purpose of binding the Crown. The 3rd section with its ancillary sections constitutes the entire statutory code as to light and provides a simpler mode for the acquisition of light than the other sections of the Act do for the acquisition of other easements or rights. The statute has been in operation for considerably more than half a century, and hitherto no one, so far as I am aware, has ever contended that light falls within the 2nd section.

The Plaintiffs further contended that previously to the conveyance of 1820 the right of light to their tenements had been acquired by prescription at the Common Law, or that a lost grant ought to be presumed, so that when the Crown acquired its title to the site of the Bankruptcy Court the site was already subject to the servitude of light which they claim. But, according to the evidence put in on behalf of the Plaintiff *Salaman*, there was standing thereon an ancient building. The evidence is to the following effect: In 1398 there was standing on the ground a building called "*Blackwell Hall*," which belonged to King *Richard* II. This building was then sold by the King to the corporation of *London*. In 1658 the Hall was rebuilt; in 1666 it was destroyed in the Great Fire; in 1672 it was again rebuilt on the same site—the building standing on the ground was used from 1398 to 1820 by the corporation as the *Cloth Hall*. This evidence is fatal to the Plaintiff *Salaman* for a reason presently to be mentioned.

From the statute of Geo. 4 it appears that the ground comprised in the conveyance of 1820 included part of the site of the ancient *Cloth Market* of *Blackwell Hall*, or the buildings belonging thereto, and that other part thereof was the site, or part of the site, of two messuages in *Basinghall Street*. The result then is, that in 1820 the Defendant's site was occupied by the ancient tenement of the *Cloth Hall* or market, and by other messuages, which, in the absence of evidence to the contrary, must be presumed to be ancient. To these tenements the custom of the city of *London* extended; which custom was that a man might rebuild his house or other edifice upon the ancient foundation to what height he pleased, though thereby the ancient windows or lights of the adjoining or opposite house were obstructed, if there were no agreement in writing to the contrary: *Wynstanley* v. *Lee* (1). The Plaintiffs' houses have been rebuilt in recent times, and evidence was given for the purpose of shewing that parts of their windows are in the same position as the lights of the houses which previously stood upon their ground. Some evidence is given on behalf of the Plaintiff *Salaman* with a view to shew that his lights were ancient; the evidence, however, is for the most part conjectural and of an unsatisfactory character. But assuming that it would, in the ordinary course, be sufficient to raise a case upon which a jury might find that the light had been enjoyed from time immemorial, or that a lost grant ought to be presumed, there is a short answer in point of law which is fatal to any such claim in all the cases before me. The presumption of any such right from twenty years' enjoyment previously to 1820 is excluded by the custom of the city of *London*; to allow any such presumption would be to destroy the custom: *Wynstanley* v. *Lee*. The same answer applies with equal force to the period of twenty years which elapsed down to the first day of Michaelmas Term, 1832, when the Act of 2 & 3 Will. 4, c. 71, came into operation. Curiously, the custom of *London* as to light is not simply abolished by that statute, but it is abolished merely for the purposes of the 3rd section. The Plaintiffs cannot, therefore, maintain their claim to light by prescription from time immemorial, or as founded on a supposed lost grant. This claim is defeated

(1) 2 Sw. 333.

CHITTY, J.
1891
PERRY v. EAMES.
SALAMAN v. EAMES.
MERCERS' COMPANY v. EAMES.

by considerations wholly independent of the Royal Prerogative, and the passage cited from *Staunforde* on the King's Prerogative (1), if a correct statement of the law, is irrelevant.

The argument for the Plaintiffs then turned back to the 3rd section. It was contended that although the section might not apply where the legal estate was vested in the Crown, it does apply where the legal estate is held by subjects in trust for the Crown. In support of this contention some authorities were cited for the Plaintiffs, but none of them really touched the point; one of them was *Sharp* v. *St. Sauveur* (2). All that was decided in that case was that the Crown could enforce in the Court of Chancery a trust of land created for an alien prior to the *Naturalization Act*, 1870. That has no bearing on the cases before me. In ancient times it was not the practice to vest the legal estate in trustees for the Crown, and thus there is little or no direct ancient authority on the point. The second resolution in the *Magdalen College Case* (3) appears, however, to be large enough to cover it. It was resolved that where the King has any prerogative, estate, right, title or interest, he shall not be barred of them by the general words of an Act of Parliament. There is no reason for confining this resolution to mere legal interests, or for excluding an absolute beneficial ownership in the Crown. In *Mersey Docks* v. *Cameron* (4), a case involving the question of the liability of the *Mersey* Docks to be rated to the poor under the statute of *Elizabeth*, Lord *Cranworth* stated the law as to the exemption of the Crown in the following passage: "The Crown not being named is not bound by the Act. It follows therefore, that lands or houses occupied by the Crown, or by servants of the Crown for the purposes of the Crown are not liable to be rated; and I conceive that it is from a confusion between property occupied for public purposes, and property occupied by servants of the Crown, that this mistake has arisen. This principle exempts from rates not only royal palaces but also the offices of the Secretaries of State, the Horse-Guards, the Post Office, and many similar buildings. On the same ground Police Courts, County Courts, and even county buildings occupied as lodgings

(1) Pages 42, 43.
(2) Law Rep. 7 Ch. 343.
(3) 11 Rep. 74 b.
(4) 11 H. L. C. 443, 508.

at the assizes for the judges have been held exempt. These decisions however have all gone on the ground more or less sound, that these might all be treated as buildings occupied by servants of the Crown, and for the Crown, extending in some instances the shield of the Crown to what might more fitly be described as the public government of the country. In none of these cases was exemption conceded on the ground contended for in the present case, and I cannot but think that the error which has crept into the decisions has arisen from confusing cases like the present with those in which the interests of the Crown, or the Crown through its servants, were directly concerned."

The judgment of Lord *Blackburn* in *Reg.* v. *McCann* (1) (also a rating case) is much to the same effect; at p. 146 he expressly places a trustee for the Crown in the same position as a servant of the Crown. Now in the cases before me the Crown's absolute beneficial ownership for the purposes of the Act is expressly manifested by a public statute, and it is obvious that the bare legal estate was vested in trustees merely for the purposes of more convenient administration by a department of the Queen's Government. I am of opinion, then, that the prerogative of the Crown takes these cases out of the operation of the 3rd section.

Only one other point remains. It was urged for the Plaintiffs that the Defendant's ground being now held by him, a subject, he is not entitled to avail himself of the Crown rights, and that inasmuch as the Plaintiffs have enjoyed the light for twenty years before this action, their title to the right is indefeasible. But this is only repeating one of the old arguments on the statute in a new form. It would allow the Plaintiffs to claim that they were in process of acquiring the right to the light during that part of the twenty years during which the property was in the possession of the Crown. The case must be tried as if the actions had been brought the day after the conveyance of 1886. To hold that the statutory period of twenty years had then run would be to ignore the Crown's rights, and the result would be that the Crown could not dispose of the property for the interest therein to which it was then entitled, or, in other

(1) Law Rep. 3 Q. B. 141.

CHITTY, J.
1891
PERRY v. EAMES.
SALAMAN v. EAMES.
MERCERS' COMPANY v. EAMES.

words, that although the Crown held the property free from the servitude or easement of light, it could not dispose of it except subject to such a servitude or easement.

There are as I understand other points of fact in dispute in these actions, but it was arranged by counsel that these should not be gone into until after I had given judgment on the above questions of law, and that it would not be necessary to go into them at all in the event of my judgment being (as it is) adverse to the Plaintiffs on the questions argued. Upon the facts, as I have stated them, giving rise to these questions of law there was no dispute between the parties.

The result is that the actions are dismissed with costs.

Solicitors: *Munns & Longden; Emanuel, Round & Nathan; Morice & Blakesley; Howard C. Morris.*

G. M.

In re JEFFERY.
BURT *v.* ARNOLD.

NORTH, J.
1890
Nov. 13.

[1890 J. 496.]

Infants—Maintenance—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 43—*Will—Gift to Members of Class for Life contingently on attaining Twenty-one—Income.*

A testator directed his trustees to hold the proceeds of sale of his residuary estate on trust to pay certain life annuities, and subject thereto on trust for such children of his son and two daughters as should attain twenty-one (the shares of his grandchildren born in his lifetime being settled):—

Held, that the surplus income of the trust fund, after keeping down the annuities, belonged to the grandchildren who had attained twenty-one at the time such income accrued. And that sect. 43 of the *Conveyancing Act*, 1881, did not apply.

THIS was a summons to determine who was entitled to accumulations of income of a fund settled by the will of *William Jeffery*, who died in February, 1887.

The testator gave the residue of his estate, both real and personal, to his trustees and executors *Francis Arnold* and *Benjamin Blatch*, upon trust to sell, collect, and convert into money, and out of the income to pay certain life annuities in manner directed, and he declared "that, subject to the trusts, directions, and declarations hereinbefore contained, the whole of my said residuary estate and the moneys to arise from such sale, collection, and conversion as aforesaid, and the investments thereof for the time being shall be held by my trustees or trustee in trust for all and every the present and future born children of my said son *Clayton William Jeffery*, and all and every the present and future born children (except *William Charles Burt*, who I declare shall take no benefit or interest whatsoever under this my will) of my said daughter *Matilda Jane Burt*, and all and every the present and future born children (including the said *Frank Harry Burt*) of my said daughter *Paulina Mary Burt*, who, whether in my lifetime or after my decease, being a son or sons, shall have attained or

NORTH, J. 1890 *In re* JEFFERY. BURT *v.* ARNOLD.

shall attain the age of twenty-one years, or being a daughter or daughters shall have attained or shall attain that age, or shall have married or shall marry, and if more than one in equal shares as tenants in common (such children of my same son and of my same two daughters) to take *per capita* and not *per stirpes*, and the respective shares under the trust last aforesaid of granddaughters of mine but born in my lifetime to be for their respective sole and separate use, but the respective shares under the same trust to be subject to the trusts, declarations, and provisions hereinafter declared concerning such shares respectively." The will contained declarations settling the shares of the testator's grandchildren born in his lifetime on such grandchildren for life with remainders to their children. The testator empowered his trustees (but not without the consent in writing of the persons previously entitled to the incomes) to advance not more than half the *corpus* of his presumptive share for the benefit of any survivor being a male.

The testator had the three children mentioned in his will only; they were all alive. His son, *Clayton William Jeffery*, married in 1889; he had no children. *Matilda Jane Burt* was married; she had besides *William Charles Burt* two children, *Montague Burt*, who was of age when the testator died, and *Mary Mabel Spencer Burt*, who was still a minor. The testator's daughter, *Paulina Mary Burt*, was living apart from her husband; she had nine children, of whom three were of age, the others still being minors. All the grandchildren were born in the testator's lifetime.

The trustees of the will had standing in their names a sum of £1221 Consols, representing the surplus income of the testator's residuary estate for three years after paying the annuitants.

The object of the summons was to obtain declarations as to how the surplus income was applicable. The Plaintiffs were *Paulina Mary Burt* and her nine children; the Defendants were the trustees and the two children of *Matilda Jane Burt*, beneficiaries under the will.

Curtis Price, for the Plaintiffs:—

I ask for a declaration enabling the trustees to pay a pro-

portionate part of the funds in their hands to Mrs. *Burt* for maintenance of her children. The adult children represented by me assent to this.

This is not a case within the principle of *In re Dickson* (1) where it was held that maintenance could not be given by virtue of sect. 43, for infants who were contingently entitled to participate in the capital. This case comes within *In re Medlock* (2), where a legacy was bequeathed in terms very similar to the gift of the residue here.

[NORTH, J.:—In that case the legacy had been set apart, and the Court of Appeal held that the direction to set apart the legacy amounted to a gift of the intermediate income.]

The residue in this case has been set apart.

Coltman, on behalf of grandchildren, who had attained twenty-one:—

The words of sect. 43 do not apply to a class liable to be increased.

Secondly, the whole income belongs to those members of the class who have already attained twenty-one when the surplus income accrued: *Shepherd* v. *Ingram* (3); *Mills* v. *Norris* (4); *Scott* v. *Earl of Scarborough* (5); *Jarman* on Wills (6); *Mainwaring* v. *Beevor* (7); *Ellis* v. *Maxwell* (8); *Furneaux* v. *Rucker* (9).

Wright Taylor, for the trustees.

Curtis Price, in reply:—

Brandon v. *Aston* (10) is inconsistent with the three cases of *Shepherd* v. *Ingram*; *Mills* v. *Norris*; *Scott* v. *Earl of Scarborough*. Notwithstanding that they were cited, the Vice-Chancellor in *Brandon* v. *Aston* (11) allowed the two adults, out of three members of a class entitled to participate in a fund contingently

(1) 29 Ch. D. 331.
(2) 55 L. J. (Ch.) 738.
(3) Amb. 448.
(4) 5 Ves. 335.
(5) 1 Beav. 154.
(6) 4th Ed. Vol. ii. pp. 168, 170.
(7) 8 Hare, 44.
(8) 12 Beav. 104.
(9) W. N. (1879), p. 135.
(10) 2 Y. & C. Ch. 24.
(11) 2 Y. & C. Ch. 24, 30.

NORTH, J. 1890 *In re* JEFFERY. BURT *v.* ARNOLD.

on attaining twenty-one, the income of two-thirds of the fund only.

NORTH, J.:—

I should be very glad, if I could, to make a provision for these children out of the income, but I do not see my way to do so. The case does not come within sect. 43 of the *Conveyancing Act*, 1881. Eliminating words that do not apply, that section runs thus: Where any property is held by trustees in trust for an infant contingently on his attaining the age of twenty-one years, the trustees may, at their sole discretion, pay to the infant's parents or guardians, if any, or otherwise apply for or towards the infant's maintenance, education or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance and education or not. A construction has been put upon that section by the Court of Appeal in *In re Dickson* (1) by which I am entirely bound, and must act on as if words to the effect of what the Court of Appeal considered the construction of the Act were actually to be found in the Act. Now that decision is this: "sect. 43 of the *Conveyancing and Law of Property Act*, 1881, empowering trustees to apply towards the maintenance of an infant the income of property held in trust for him contingently on his attaining the age of twenty-one years, does not authorize the allowance of maintenance where, apart from the Act, the infant on attaining twenty-one would only be entitled to the legacy without interest."

What I have to look at first, is whether the infants on attaining twenty-one would be entitled to past income, for if they would not, then according to the decision of *In re Dickson* the section does not apply.

There are two difficulties in the way of allowing maintenance for infants. In the first place it is impossible to say at the present moment what their shares will be, because other persons may be brought into existence who will be entitled to compete in the division of the fund; if I cannot say what the shares of the infants will be, it is equally impossible to say what

(1) 29 Ch. D. 331.

the income of an unascertainable share is. If the matter rested there I might be able to help the parties, for though I cannot say what their share will be, the infants, if they attain twenty-one, will receive something, and I might by way of insurance provide a fund available for the maintenance of the infants, so that what they received would be made good.

But there is a further difficulty. Is there any income that the infants can call for when they attain twenty-one? The question is, to whom does the income belong in the meantime? And the decisions seem to me to shew that it belongs to such of the grandchildren as have attained twenty-one at the time the income accrues, to the exclusion of the others. The cases cited seem to me to bear that out completely, especially *Shepherd* v. *Ingram* (1); *Mills* v. *Norris* (2); *Scott* v. *Earl of Scarborough* (3). It is suggested that *Brandon* v. *Aston* (4) is a later case, and is at variance with those three decisions; and it is said they were there cited, and that what was laid down in those cases was not followed. I do not know why the order was made in the way it was as to income in *Brandon* v. *Aston*. It was asked on the part of the adult children that their shares of capital might be paid out at once. If the class could not have increased, they would have been entitled to one-third share of capital each at once. If it might increase, they would not have been entitled. But no question was raised as to their being entitled to the whole income. I do not find any question for the decision of the Court upon that. All that appears is, that the Court gave two-thirds of the income to the two adults, and one-third was carried over to the account of the contingent shares of the infant. It is said that if the former decisions were right, the whole income ought to have been given to the adults. I do not find that they ever asked for it, or that there was any suggestion that the previous decisions were not right, or that the learned judge departed from them and came to a different decision. According to the report, "the Vice-Chancellor said that he considered the case so circumstanced as to justify him at present in withholding the capital from the adult children. He

(1) Amb. 448.
(2) 5 Ves. 335.
(3) 1 Beav. 154.
(4) 2 Y. & C. Ch. 24, 30.

NORTH, J.
1890
In re JEFFERY.
BURT *v.* ARNOLD.

should, however, allow them the interest of their shares, which, if not otherwise right, might be supported by analogy to the course frequently taken by the Court as to maintenance." I do not think that conflicts with the older cases.

In addition, there is a later case, *Furneaux* v. *Rucker* (1). The only report of the case is in the *Weekly Notes*. The point is shortly and clearly stated thus: "Bequest in trust for the daughter of the testatrix for life, and after her decease for all her children living at the death of the testatrix, who being sons should attain twenty-one, or who being daughters should attain that age, or marry, in equal shares. The daughter who survived the testatrix died, leaving three children, born in the testatrix's lifetime. The Master of the Rolls considered that the income of the property up to the time when the eldest child attained twenty-one should fall into the residue, and that on his attaining twenty-one he was entitled to the whole of the income until the next child attained twenty-one, when the two eldest were entitled to share the income until the youngest attained a vested interest in the property, when the *corpus* would be divided between them in equal shares." There it was unnecessary to deal with the possibility of an increase of the class, for the limit of the number of the class was already ascertained. That decision is one that seems to me directly to apply to the present case.

I should be very glad to decide the other way if I could. But I must decide that the income as it accrues belongs to the children of the testatrix's son and daughters who have at the time attained twenty-one.

Solicitor for the Plaintiffs and trustees: *J. J. Harlow*, agent for *Goater & Blatch, Southampton.*

Solicitors for the other Defendants: *Whitehouse & Etherington*, agents for *Tylee & Mortimer, Romsey.*

(1) W. N. (1879), p. 135.

D. P.

Ex parte KING'S COLLEGE, CAMBRIDGE.

NORTH, J.

1891

Feb. 21.

College—Erection of new Buildings—Application of Purchase-money of Land paid into Court under Lands Clauses Consolidation Act—Repayment by Instalments—Universities and College Estates Act, 1858 (21 & 22 *Vict. c.* 44), *ss.* 27, 28 [*Revised Ed. Statutes, vol. xiii., p.* 288]—*Universities and College Estates Amendment Act*, 1880 (43 & 44 *Vict. c.* 46), *ss.* 2, 4—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 69 [*Revised Ed. Statutes, vol. ix., p.* 642].

The effect of sects. 27 and 28 of the *Universities and College Estates Act*, 1858, in conjunction with sects. 2 and 4 of the *Universities and College Estates Amendment Act*, 1880, is to provide, in the case of land belonging to a university or a college which is taken compulsorily under the provisions of the *Lands Clauses Consolidation Act*, 1845, another mode of investment of the purchase-money in addition to those mentioned in sect. 69 of the *Lands Clauses Consolidation Act*.

PETITION by the provost and scholars of *King's College, Cambridge*, asking that a fund in Court might be applied in paying the cost of some new buildings which were in course of erection at the college.

The petition was entitled, "In the matter of the *Lands Clauses Consolidation Act*, 1845; in the matter of the *Universities and College Estates Acts*, 1858 to 1880; and in the matter of the *London, Chatham and Dover Railway* (*City and Suburban Traffic Station*) *Act*, 1881."

The *London, Chatham, and Dover Railway Company*, under the powers conferred on them by their above-mentioned Act, with which the *Lands Clauses Consolidation Act*, 1845, was incorporated, took some land in the city of *London* which belonged to the college. The amount of the purchase-money and compensation was determined by arbitration to be £20,000, and this amount was paid into Court by the company, and was, under an order of the Court, invested in the purchase of £19,536 India 3½ per Cent. Stock. The petitioners had entered into a contract for the erection of some additional buildings, for the occupation of resident members of the college, for the sum of £25,772. The contract provided for the completion of the buildings by the 15th of August, 1892. The contract price was payable by

NORTH, J.
1891
Ex parte KING'S COLLEGE, CAMBRIDGE.

instalments. The petition (as amended after it first came into the paper for hearing) stated that the petitioners desired to have the sum of £19,800 raised by means of a sale of the India stock in Court, and applied towards paying the cost of the erection of the buildings. The petitioners had been advised that, under the provisions of the *Lands Clauses Consolidation Act*, 1845, and the *Universities and College Estates (Amendment) Act*, 1880, the application of the £19,800 towards the erection of the buildings might properly be treated as a permanent investment of that sum; but they desired to replace the amount by thirty equal annual instalments of £660, in order that the same sum might again become available for the purposes to which it was applicable under the Acts.

The petition (as amended) asked that the stock might be sold, so as to raise three sums of £5000 each respectively on the 15th of January and the 15th of July, 1891, and the 15th of January, 1892, and a fourth sum of £4800 on the 15th of July, 1892, and that the proceeds of such sales respectively might be paid to the petitioners, they undertaking to apply the same towards the erection and completion of the additional buildings, and also undertaking to make the yearly payments into Court hereinafter mentioned. The petition (as amended) also asked that the Petitioners might be at liberty to pay into Court, on the 15th of January, 1892, and on the same day in every subsequent year, up to and including the year 1921, the sum of £660, and that each such sum, when paid in, might be invested in India 3½ per Cent. Stock, the Petitioners undertaking to pay the brokerage.

When the petition first came on for hearing Mr. Justice *North* held (1) that, by virtue of sect. 27 (2) of the Act of 1858, and

(1) *Ante*, p. 333.

(2) Sect. 27 of the Act of 1858 provides: "It shall be lawful for the said universities, and any college therein respectively . . . from time to time, and at any time hereafter, with the consent of the said Copyhold Commissioners (such consent to be evidenced by an order to be issued under their hands and common seal, in the form or to the effect set forth in the said schedule hereto), to raise by mortgage of any lands belonging to such university or college, for any term of years (determinable as hereafter provided), such sum or sums of money (together with all reasonable costs and expenses incidental to such raising and the application thereof) as shall be certified by the surveyor of the university or college to be properly required, and shall be authorized

sect. 4 of the Act of 1880, it was necessary to obtain the consent of the Board of Agriculture, and the hearing was adjourned for that purpose.

The Board of Agriculture were served with the petition, and it now came on again for hearing.

Cozens-Hardy, Q.C., and *Gaselee*, for the Petitioners:—

The Board of Agriculture appear by counsel and consent. That being so, the Court has jurisdiction, by virtue of sects. 2 and

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by the said Commissioners, with interest thereon not exceeding the rate to be specified in such order, and to apply such sum or sums of money for all or any of the purposes following; (that is to say), *inter alia*, for or towards the erection of new or additional houses or buildings, or for the extension and improvement of any existing houses or buildings upon any lands belonging to such university or college."

Sect. 28 provides for the repayment of the money so borrowed by means of equal instalments during a period of thirty years.

Sect. 2 of the Act of 1880 provides:—

"(1.) The purchase-money of land sold by a university or college under the *Universities and College Estates Act*, 1858, or any other Act amending the same, shall, with the consent of the Copyhold Commissioners, be from time to time applicable by the university or college in the repayment of any money borrowed under any of those Acts, or to any of the purposes to which money so borrowed is applicable under those Acts."

"(2.) Where any such purchase-money is so applied, the like provisions shall be made by the university or college for replacing the same as is by sect. 28 of the *Universities and College Estates Act*, 1858, required to be made for the repayment of money borrowed under that Act."

By sect. 4: "The provisions of this Act shall apply as well to moneys which have arisen from any sale, enfranchisement, or exchange of lands belonging to a university or college under and by virtue of the aforesaid Acts, as to moneys belonging solely to any such university or college which may have arisen from the sale, enfranchisement, or exchange of any such lands under any other Act of Parliament, or otherwise howsoever, and which may be now or hereafter standing to the account or credit of any cause or matter in the Supreme Court of Judicature or in Her Majesty's High Court of Justice, or any division thereof, or in the names of trustees nominated in pursuance of any Act of Parliament."

By sect. 48 of the *Settled Land Act*, 1882, the Land Commissioners for England were substituted for the Copyhold Commissioners.

By the *Board of Agriculture Act*, 1889 (52 & 53 Vict. c. 30), a Board of Agriculture was established, and sect. 2 of the Act provided that there should be transferred to the Board the powers and duties of the Land Commissioners for England under (*inter alia*) the *Universities and College Estates Acts* of 1858 and 1880.

NORTH, J. 1891 *Ex parte* KING'S COLLEGE, CAMBRIDGE.

4 of the Act of 1880, in conjunction with sects. 27 and 28 of the Act of 1858, to sanction what is proposed. The effect of sect. 4 of the Act of 1880 is to bring money which has been paid into Court under the *Lands Clauses Consolidation Act*, within the provisions of sects. 27 and 28 of the Act of 1858. The only difficulty is that the first of the thirty instalments will become due at the same time as the third payment out of Court.

[NORTH, J.:—I think the best course will be to deduct the first of the thirty instalments from the amount which would otherwise be paid out as the third instalment of the £19,800.]

We do not ask that the costs of the petition should be paid by the company.

G. Pemberton Leach, for the Board of Agriculture, consented to the prayer of the petition.

[NORTH, J.:—I think that, strictly speaking, the consent of the Board ought to be evidenced by an order under their hands and seal, as mentioned in sect. 27 of the Act of 1858. But, as the Board appear by counsel and consent, I do not think I need require them to make such an order.]

Hornell, for the railway company:—

The petition is really asking for the sanction of the Court to a permanent investment of the money in land. There is no jurisdiction to order money which has been paid into Court under the *Lands Clauses Consolidation Act*, 1845, to be laid out in building, and then to be repaid in this way by instalments. The mode in which money so paid is to be invested is dealt with by sect. 69 of the *Lands Clauses Consolidation Act*, 1845. The result of doing what is asked may be to saddle the company with additional costs.

NORTH, J.:—

In my opinion, sect. 4 of the Act of 1880 applies to this case, and the effect of it, taken in conjunction with sects. 27 and 28 of the Act of 1858, is to provide, in the case of university or college land taken compulsorily under the *Lands Clauses Consoli-*

dation Act, another mode of investment of the purchase-money in addition to those which are mentioned in sect. 69 of that Act. If the college had asked that the company should pay the costs of this petition, I think they would have been entitled to them. What the effect of their not asking for costs now may be upon any future petition, it will be time enough to consider when the question arises. I should have thought that the simplest plan would have been to treat these buildings as a permanent investment of the money, and to ask that the company should pay the costs of this petition. But the college do not choose to do this; and they must run the risk of possibly falling between two stools, and not obtaining any costs from the company. I am not expressing any decided opinion on this point; I only say that this is a possible result.

Solicitors: *F. & T. Smith & Sons; White, Borrett & Co.; John White.*

W. L. C.

STIRLING, J.
1890
Nov. 6.
1891
Jan. 14.

In re PARKER.
WIGNALL *v.* PARK.

[1890 P. 177.]

Charitable Bequest—Waterworks Mortgage—Pure or impure Personalty—Mortmain.

The corporation of *Preston*, as the local board of health, in exercise of their powers under the *Preston Waterworks Act*, 1853, the *Local Government Supplemental Act*, 1861, and the *Preston Improvement Act*, 1869, and in consideration of £150, mortgaged to the testatrix, "her executors, administrators, and assigns, such proportion of the rents, rates, and waterworks which by the said acts" were authorized, as the principal sum bore to the whole sum borrowed, to hold until the principal sum and interest should be paid and satisfied:—

Held, that such mortgage was in substance a mortgage of the general undertaking, and did not confer upon the testatrix an interest in land within the *Mortmain Acts*; and consequently that the mortgage debt was pure personalty and passed under a bequest in her will for charitable purposes.

The authorities considered.

Adjourned summons.

The question raised by this summons was whether a borough of *Preston* waterworks mortgage for £150, part of the estate of the testatrix *Rachel Parker*, ought or ought not to be treated as pure personalty, so as to pass under a bequest in her will for charitable purposes.

The mayor, aldermen, and burgesses of the borough of *Preston*, by whom the mortgage in question was granted, were, under sect. 12 of the *Public Health Act*, 1848, by the council of the borough, the local board of health; and the mortgage, which was dated the 30th of November, 1882, was, so far as is material, in the following form:—

"Borough of *Preston* Waterworks Mortgage.

"By virtue of the *Preston Waterworks Act*, 1853, the *Local Government Supplemental Act*, 1861, and the *Preston Improvement Act*, 1869, the mayor, aldermen, and burgesses of the borough of *Preston* . . . in exercise of the powers of the said corporation, and in consideration of the sum of £150 paid . . . by *Rachel*

Parker . . . herein called the mortgagee, for the purposes of the said Acts . . . do grant and assign to the mortgagee, her executors, administrators, and assigns, such proportion of the rents, rates, and waterworks which by the said Acts . . . the corporation are authorized to charge, levy, purchase, and make, and also of the general district rate in the same Acts . . . mentioned as the principal sum, doth, or shall bear, to the whole sum which is, or shall be, borrowed . . . and do also grant and assign to the mortgagee . . . such proportion of the general district rate by the *Public Health Acts*, 1848 and 1875 . . . authorized to be made as the principal sum doth, or shall, bear to the whole sum which is, or shall be, borrowed . . . to hold the said premises . . . unto the mortgagee, her executors, administrators, and assigns until the whole of the principal sum, with interest at the rate of £3 10*s.* per cent., shall be fully paid and satisfied."

And the mortgage provided that the principal should be paid on the 1st of December, 1885.

The material provisions of the *Preston Waterworks Act*, 1853, which was the earliest in date and the most important of the statutes in pursuance of which the mortgage purported to be given, are shortly as follows:—

The preamble, after stating (*inter alia*) that under certain previous Acts a company had been formed for supplying the borough with water, which company had erected waterworks, recited that the population of the borough was rapidly increasing, and the supply of water from the company's works was inadequate for the wants of the district; and that it was expedient that better provision should be made of the supply of water for the borough. It then recited an agreement between the local board and the company for the purchase of "all the undertaking of the said company," the purchase to include (*inter alia*) "all lands, reservoirs, works, implements, and utensils." Then, after reciting that it was expedient that the agreement should be carried into effect and that the supply of water should be placed under the control and management of the local board, and that they should be authorized to alter, extend, and enlarge the said waterworks, it was enacted (*inter alia*) to the following effect: Sect. 3 incorporated the *Lands Clauses Consolidation Act*, 1845, and the

STIRLING, J. 1891 *In re* PARKER. WIGNALL *v.* PARK.

Waterworks Clauses Consolidation Act, 1847. Sect. 4 empowered the local board to make and maintain "the said waterworks, together with all proper reservoirs, conduit pipes, and other works connected therewith," according to the deposited plans and book of reference; and to enter upon and take and use such of the lands, streams, and water therein delineated and described as should be necessary, and to take therefrom such water as they might require for the purposes of the Act. Sect. 12 provided that the local board should, "when the undertaking and works of the company should come into their possession, and at all times thereafter," supply every dwelling-house within the borough with water for domestic purposes, upon the rents, rates, and assessments, and in manner in the Act provided. Sect. 39 provided that the board should furnish to every owner entitled to demand it a sufficient supply of water for their domestic uses at certain rates. Sects. 41 and 43 provided that "the said rents and rates" should be paid in advance, and that the board might make "any rate" prospectively. Sect. 45 empowered the board to raise yearly on the general district rates money sufficient to pay for flushing the sewers. Sect. 51 empowered the board "to borrow for the purposes of this Act upon the security of the rents, rates, and works authorized by this Act to be charged, levied, purchased, and made, or on security of the general district rates authorized to be made by this Act, or by the *Public Health Act*, 1848, or on all or any of the said securities," such sum as should be necessary for paying to the company the purchase-money "for their undertaking," and any further sum not exceeding £80,000; and it was provided by sect. 53 that the board should include the money required for the purposes of the Act in the general district rates for the purposes of the borough; by sect. 54, that the board should keep a distinct account, to be called "The Water Account," of all moneys received and paid under the provisions of the Act, and that all sums of money received by virtue of the water-rents or rates under the Act, and "all rents and sums of money to be recovered under the provisions of the Act" should be carried to the credit of such "water account"; and by sect. 55, "that the payment of any principal money borrowed by the said local board under the authority of this Act, and the interest

thereof, and all expenses incurred by the said local board in carrying this Act into execution, shall be charged upon the moneys hereby directed to be carried to the credit of the water account, and the interest of all such principal sums shall be a first charge upon the funds." Sect. 58 empowered the local board to appoint all such officers and servants as they should think fit for the purposes of the Act, and also to remove them and appoint others in their stead, and made certain provisions of the *Public Health Act*, 1848, applicable with respect to such officers; and sect. 59 provided that the justices by whom any payment or forfeiture should be imposed should, where the application thereof was not otherwise provided for, award the same to the local board to be by them used and applied for the purposes of that Act.

The *Preston Improvement Act*, 1869 (32 & 33 Vict. c. lxxxvii.), recited in its preamble that the works referred in the Act of 1853 were insufficient to meet the increased demand for water in the borough, and that it was expedient, therefore, that the local board should be empowered to extend these waterworks in the manner shewn upon the plans deposited, and further recited (*inter alia*) the borrowing powers of the local board, and their debts and engagements, and that it was expedient that their present borrowing powers should be altered and enlarged. The Act then (sect. 2) incorporated the *Lands Clauses Consolidation Acts*, 1845 and 1860, so much of the *Waterworks Clauses Act*, 1847, as relates to the construction of the waterworks and the accommodation of adjoining lands; the *Waterworks Clauses Act*, 1863, and the provisions of the *Commissioners Clauses Act*, 1847, with respect to mortgages to be executed by the commissioners; sect. 14 enacted that the local board might defray the expense of constructing waterworks out of moneys they were empowered to borrow, and that all moneys received or expended by them for waterworks purposes should be included in the water account referred to in the 54th section of the Act of 1853. Sect. 16 empowered the local board to borrow on mortgage to repay moneys already borrowed. Sect. 17 established a sinking fund as to moneys borrowed for waterworks, and sects. 21 and 22 enabled the board to make regulations for preventing the waste,

STIRLING, J. misuse, or contamination of water, and to impose penalties for breach of such regulations.

1891

In re PARKER.

WIGNALL *v.* PARK.

Strickland, for the next of kin of the testatrix:—

In the purchase by the local board of the "undertaking" of the original company, "all lands, reservoirs, works, implements, and utensils," were expressly included. The security given by the local board is an assignment by way of mortgage of the "rents, rates, and waterworks"; and the term "waterworks" must be taken to include all that the board purchased, and all the additions they themselves have made thereto. This mortgage gives the mortgagee a charge, by virtue of which she could have obtained a receiver of the income of the property charged. In *Chandler* v. *Howell* (1), the case of a waterworks mortgage very similar in form to the present, the subject-matter of the security was "the works, rents, and rates"; and Vice-Chancellor *Hall*, after going through the authorities, held that the mortgage conferred upon the lender an interest in land within the *Statute of Mortmain*. *Attree* v. *Hawe* (2) is supposed to overrule *Chandler* v. *Howell*; but, although the headnote goes to that extent, *Chandler* v. *Howell* was not dealt with by the Court of Appeal. *Attree* v. *Hawe* was a decision as to railway debenture stock; but it has been for some time settled that railway debentures are not within the statute; and if this had merely been an assignment of the "undertaking," I could not have contended that the money secured by it would have been impure personalty. The present security is, however, analogous to a mortgage made by a turnpike trust, and there is a distinction between mortgages of the "undertaking" and specific mortgages like this of a share of "rents, rates, and waterworks," which confer upon the mortgagee an interest in land: *In re David* (3). Moreover in this case, by sect. 55 of the Act of 1853, the principal moneys borrowed by the board are expressly charged upon the moneys directed to be carried to the credit of the water account, and the interest is made a first charge upon the funds. The money here in question is, accordingly, impure personalty within the *Statute of Mortmain*.

(1) 4 Ch. D. 651. (2) 9 Ch. D. 337.
(3) 41 Ch. D. 168; 43 Ch. D. 27.

1891

In re PARKER. WIGNALL *v.* PARK.

Ingle Joyce, for the charity:—

The *Preston Waterworks Act* imposed upon the local board the duty of supplying and continuing to supply the inhabitants of the borough with water; and the word "waterworks" in this mortgage must be construed as meaning the "undertaking" as a going concern, and not any specific part of it, otherwise the effect of it might be to bring to an end the waterworks for the purposes of which the board were empowered to borrow the money: *Gardner* v. *London, Chatham, and Dover Railway Company* (1); *Holdsworth* v. *Davenport* (2); *In re Thompson* (3). The decision in *Chandler* v. *Howell* (4) must be taken to be overruled in *Attree* v. *Hawe* (5). *In re David* (6) was the case of a mortgage of the tolls of a bridge, and there was no assignment of the "undertaking," or anything equivalent to it. In the *Companies Clauses Consolidation Act*, 1845 (8 & 9 Vict. c. 16), s. 2, "undertaking" is defined as meaning "the undertaking or works of whatever nature" authorized by the special Act; and the term "waterworks" needs no definition, and means that specific kind of undertaking. In this case, although the word "rents" is used in the 12th and 41st section of the Act of 1853, and the expression "rents" or "water rents" once or twice afterwards, there are no rents as distinguished from rates, and the mortgage is, in fact, of the rates and waterworks undertaking, and the inclusion in the term "undertaking" of "lands, reservoirs," and so on, makes no difference whatever. In the recent case of *Re Yerbury's Estate* (7), "the *North-Eastern Railway* and undertaking, and all branch railways, lands, and hereditaments connected therewith and belonging thereto," were assigned by a mortgage debenture, and it was held that this was only a mode of describing the whole undertaking, and that the mortgage money might be validly bequeathed to a charity.

W. D. Rawlins, for the executors of the will.

Strickland, in reply.

(1) Law Rep. 2 Ch. 201.
(2) 3 Ch. D. 185.
(3) 45 Ch. D. 161.
(4) 4 Ch. D. 651.
(5) 9 Ch. D. 337.
(6) 41 Ch. D. 168; 43 Ch. D. 27.
(7) 62 L. T. (N.S.) 55.

STIRLING, J. 1891 *In re* PARKER. WIGNALL *v.* PARK.

STIRLING, J.:—The distinctions in this class of cases run so fine, that I must consider the question.

1891. Jan. 14. STIRLING, J., after stating the facts of the case to the effect above reported, remarked that the *Commissioners Clauses Act*, 1847 (10 & 11 Vict. c. 16), by sect. 75, prescribed a form of mortgage which had been closely followed in the mortgage in the present case; and that the same Act, by sects. 86 and 87, provided, where interest or principal was in arrear, for the appointment of a receiver of the "rates or sums liable to payment of such interest or such principal and interest"; and further observed that these clauses closely resembled the analogous sections of the *Companies Clauses Act*, 1845. [His Lordship then, after saying that nothing turned upon the *Local Government Act*, 1861, continued as follows:—]

The question raised is, in substance, whether a mortgage like this falls within what was laid down by the Court of Appeal in *Attree* v. *Hawe* (1). Previously to that case there had been a great conflict of opinion as to whether debentures given by railway companies and other public bodies fell within the provisions of 9 Geo. 2, c. 36, commonly called the *Mortmain Act*. In *Walker* v. *Milne* (2), Lord *Langdale* held that mortgages by a canal company containing an assignment of the undertaking, and the rates arising by virtue of the Act incorporating the company, did not create interests in land within the meaning of the statute of Geo. 2, saying (3): "These securities are given by the authority of the Act of Parliament, plainly with a view to the concern continuing, and not with a view of coming to a Court of Equity to have it broken up and possession taken by this Court." On the other hand, Lord Justice *Knight Bruce*, when Vice-Chancellor, in *Ashton* v. *Lord Langdale* (4), declined to follow *Walker* v. *Milne*, and held that such mortgages did "charge hereditaments —viz., the tolls, if not the land itself, by the use of which the tolls are obtained."

In 1867 was decided *Gardner* v. *London, Chatham, and Dover Railway Company* (5), which threw much light on the nature of an

(1) 9 Ch. D. 337.
(2) 11 Beav. 507.
(3) 11 Beav. 518.
(4) 4 De G. & Sm. 402, 413.
(5) Law Rep. 2 Ch. 201.

ordinary debenture of a railway company containing an assignment of "the undertaking of the company as defined by the special Act, and all the tolls and sums of money arising upon or out of the undertaking by virtue of the several Acts relating thereto." It was contended that under such an assignment the debenture-holders were entitled to a receiver of the proceeds of surplus lands; but the Court of Appeal held otherwise. In arriving at this conclusion it became necessary to consider what the effect of such a debenture was, and Lord *Cairns*, then Lord Justice, in his well-known judgment, says (1): "The term 'undertaking' is the proper style, not for the ingredients, but for the completed work, and it is from the completed work that any return of moneys or earnings can arise. It is in this sense, in my opinion, that 'the undertaking' is made the subject of a mortgage. . . .; the undertaking, so far as these contracts of mortgage are concerned, is, in my opinion, made over as a thing complete or to be completed; as a going concern, with internal and parliamentary powers of management not to be interfered with; as a fruit-bearing tree, the produce of which is the fund dedicated by the contract to secure and to pay the debt. The living and going concern thus created by the Legislature must not, under a contract pledging it as security, be destroyed, broken up, or annihilated. The tolls and sums of money *ejusdem generis*—that is to say, the earnings of the undertaking—must be made available to satisfy the mortgage; but, in my opinion, the mortgagees cannot, under their mortgages, or as mortgagees—by seizing, or calling on this Court to seize, the capital, or the land, or the proceeds of sales of land, or the stock of the undertaking—either prevent its completion, or reduce it into its original elements when it has been completed." Lord Justice *Turner* agreed with the reasons on which this judgment was founded.

In this state of the authorities Vice-Chancellor *Malins* held, in *Holdsworth* v. *Davenport* (2), that a debenture of a waterworks company, containing an assignment of the undertaking and the rents, rates, and sums of money arising by virtue of the several Acts relating thereto, did not create an interest in land within the meaning of the statute of 9 Geo. 2, c. 36. His Lordship

(1) Law Rep. 2 Ch. 217. (2) 3 Ch. D. 185.

STIRLING, J. 1891 *In re* PARKER. WIGNALL *v.* PARK.

said (1): "I think all questions are now removed by *Gardner* v. *London, Chatham, and Dover Railway Company* (2), which decided that a mortgage debenture made by a railway company in the form given in Schedule C of the *Companies Clauses Consolidation Act*, 1845, does not give the debenture-holder a specific charge upon the surplus lands of the company, or the proceeds of the sale of them, so as to entitle him to an order for a receiver of the sale moneys or *interim* rents. Therefore the mortgagee has only a right to take the tolls, and it follows that he has not an interest which is within the *Mortmain Act*."

On the other hand, in *Chandler* v. *Howell* (3), Vice-Chancellor *Hall* declined to follow *Holdsworth* v. *Davenport* (4), and held that a mortgage by commissioners of the town of *Aberystwith* containing an assignment of "works, rents, and rates authorized to be erected, reserved, made, and collected" by an Act of Parliament did create an interest in land. It is to be observed that the form of debenture closely resembles that in this case.

In *In re Mitchell's Estate* (5), Vice-Chancellor *Bacon* held that a debenture mortgage made by a railway company, in the form given in the schedule to the *Companies Clauses Consolidation Act*, 1845, was pure personalty, expressing his preference for the decision of Vice-Chancellor *Malins* in *Holdsworth* v. *Davenport* to that of Vice-Chancellor *Hall* in *Chandler* v. *Howell*, if those decisions were irreconcilable, which, however, he does not appear to have thought that they were.

Attree v. *Hawe* (6), which related, not to debentures, but to debenture stock, came in the first instance before Vice-Chancellor *Hall*, who followed his own decision in *Chandler* v. *Howell*. In the Court of Appeal Lord Justice *James*, after referring to *Doe* v. *St. Helen's Railway Company* (7), *Hart* v. *Eastern Union Railway Company* (8), and *Gardner* v. *London, Chatham, and Dover Railway Company*, says (9): "With the light thrown by these cases on the real legal operation and effect of a railway debenture, it is

(1) 3 Ch. D. 190.
(2) Law Rep. 2 Ch. 201.
(3) 4 Ch. D. 651.
(4) 3 Ch. D. 185.
(5) 6 Ch. D. 655.
(6) 9 Ch. D. 337.
(7) 2 Q. B. 364.
(8) 7 Ex. 246.
(9) 9 Ch. D. 348.

impossible not to prefer the decision of Lord *Langdale* in *Walker* v. *Milne* (1) to the decision of Vice-Chancellor *Knight Bruce* in *Ashton* v. *Lord Langdale*" (2). It is to be observed that in the cases of *Walker* v. *Milne*, *Gardner* v. *London, Chatham, and Dover Railway Company* (3), and *Attree* v. *Hawe* (4) all the Judges rely on this—that a different construction of the security would enable the mortgagee to break up and destroy that which was intended by the Legislature to be maintained as a going concern. The head-note to the report of *Attree* v. *Hawe* says that *Chandler* v. *Howell* (5) was overruled. It was not, however, expressly overruled; and the learned counsel for the appellants say in their argument, "*Chandler* v. *Howell* might well stand with a reversal of the present decision." The Court of Appeal did, however, expressly approve the decision in *Walker* v. *Milne*; and it is, I think, to be inferred from the judgment that their Lordships approved the decision of Vice-Chancellor *Malins* in *Holdsworth* v. *Davenport* (6).

The question in the present case, therefore, appears to me to reduce itself to this—whether, notwithstanding difference of language, the mortgage given by the corporation of *Preston* to the testatrix is not in substance a mortgage of the general undertaking similar to the debentures which formed the subject of discussion in *Gardner* v. *London, Chatham, and Dover Railway Company*, and of the decision in *Holdsworth* v. *Davenport*. If it be not, then it is an assignment of the specific items of property included under the terms, "rents, rates, and waterworks which by the Acts, or any of them, the corporation are authorized to charge, levy, purchase, and make," and consequently of the works themselves and the site thereof.

In opposition to this view of the construction, it may be observed that the assignment is to the testatrix, "her executors, administrators, and assigns," not to her heirs. It would seem, then, that the framers of the mortgage did not imagine they were dealing with anything in the nature of real estate.

A more serious objection is that upon this construction the mortgagees would have it in their power to seize the works and

(1) 11 Beav. 507.
(2) 4 De G. & Sm. 402, 413.
(3) Law Rep. 2 Ch. 201.
(4) 9 Ch. D. 337.
(5) 4 Ch. D. 651.
(6) 3 Ch. D. 185.

STIRLING, J. 1891 *In re* PARKER. WIGNALL *v.* PARK.

break them up. Can such an intention be attributed to the Legislature? These works have been placed in the hands of a public body, the corporation of *Preston*, for an important public purpose (which some at least may consider to be of not less importance than that for which a railway company is incorporated) —viz., the providing an adequate supply of water within the populous and growing borough of *Preston*. On the corporation is imposed (sect. 12 of the Act of 1853) the obligation of supplying at all times thereafter to every dwelling-house within the borough water for domestic purposes. To enable them to discharge that duty, they were empowered not merely to collect rents as the price of the water supplied, but (sect. 43) to impose rates for the purposes of the Act. They are to appoint officers and servants for the purposes of the Act (sect. 58), and (sects. 21 and 22 of the Act of 1869) to make and enforce regulations for preventing the waste, misuse, or undue consumption or contamination of the water. It seems to me that the Legislature plainly contemplated that the waterworks should, notwithstanding the mortgages authorized by sect. 51, continue as a going concern, under the control and management of the corporation, and upon their responsibility, and that it would be inconsistent with that object if such a construction as is contended for by the next of kin were placed on the section just referred to, and the mortgages given in pursuance of it. I think, then, that the words, "rents, rates, and works authorized by the Act to be charged, levied, purchased, and made," are to be read and construed in the same way as the words, "the undertaking authorized and the rents and rates arising by virtue of the Act." In coming to this conclusion, I am fortified by the decision of Mr. Justice *Chitty* in *Re Yerbury's Estate* (1); and with that decision, if I may respectfully say so, I entirely agree.

On behalf of the Respondents, much reliance was placed on the case of *In re David* (2), and on sect. 55 of the Act of 1853. As regards *In re David*, it is to be observed that the mortgage there in question contained an assignment simply of the several rates, tolls, rents, and other moneys arising and accruing by virtue of the Acts. There was no assignment of the under-

(1) 62 L. T. (N.S.) 55. (2) 41 Ch. D. 168; 43 Ch. D. 27.

taking, nor anything equivalent to such an assignment; there was, therefore, wanting that which formed the basis of the judgments in *Walker* v. *Milne* (1), *Gardner* v. *London, Chatham, and Dover Railway Company* (2), and *Attree* v. *Hawe* (3). It was held that under these circumstances the mortgage created a specific charge on certain tolls which formed part of the subject-matter of the security.

In this case, on the construction of the Act of 1853, and the mortgage, I come to a different conclusion.

As regards sect. 55, it is one which (so far as appears by the reports) was not found in the Acts of Parliament under which were issued the securities which formed the subjects of decision in *Walker* v. *Milne*, *Gardner* v. *London, Chatham, and Dover Railway Company*, *Holdsworth* v. *Davenport* (4), or *In re Mitchell's Estate* (5). I think the case of *In re David* (6) affords the answer to the arguments founded on it. There the provisions of the *Swansea Harbour Act*, 1854, resembled those of the Act of 1853, and, in particular, sect. 108 contained a provision under which moneys to the credit of *Swansea* harbour fund were to be applied partly in paying interest on borrowed moneys. It was said, however, by the Lord Chief Justice and Lord Justice *Fry* that these provisions merely operated as directions to the trustees of the fund as to the mode in which the fund was to be applied, and did not affect the construction of the mortgages. So here it seems to me that sect. 55 is a direction to the corporation as to the mode in which the moneys to the credit of the water account are to be dealt with.

In support of that view I may make two observations—first, the moneys to be placed to the credit of that account include not only "rents" and "rates" within the meaning of sect. 51, but also (sect. 54) all "sums of money to be recovered under the provisions of the Act," and consequently sums (such, for example, as the penalties and forfeitures referred to in sect. 59) not included in the mortgages. Secondly, the expenses of carrying the Act into execution are made a charge on the

(1) 11 Beav. 507.
(2) Law Rep. 2 Ch. 201.
(3) 9 Ch. D. 337.
(4) 3 Ch. D. 185.
(5) 6 Ch. D. 655.
(6) 41 Ch. D. 168; 43 Ch. D. 27.

STIRLING, J. 1891 *In re* PARKER. WIGNALL *v.* PARK.

moneys in question no less than the principal money borrowed and the interest thereon; and although the interest is made a first charge, still, as between payment of principal and payment of expenses, the corporation would have the like discretion as is vested in the directors of a railway company, according to the judgments of Lord *Cairns* in *Gardner* v. *London, Chatham, and Dover Railway Company* (1), and Lord Justice *James* in *Attree* v. *Hawe* (2). In my opinion the mortgage debt is pure personalty, and the summons must be answered accordingly.

Solicitors: *H. B. Clarke & Sons*, agents for *Gordon, Hunter, & Macmaster, Bradford; Hollams, Son, Coward, & Hawkesley; Brownlow & Howe*, agents for *Edelston & Sons, Preston.*

(1) Law Rep. 2 Ch. 218. (2) 9 Ch. D. 348.

W. W. K.

KEKEWICH, J.
1891
Jan. 21, 22.

In re CROOM.
ENGLAND *v.* PROVINCIAL ASSETS COMPANY.

[1890 C. 3787.]

Bankruptcy—Scheme of Arrangement—"Commencement" of Scheme—Approval of Court—Debtor—"Property of the Bankrupt"—After-acquired Property—Subsequent Assignment of Debtor—Title of Trustee—Order of Discharge—Bankruptcy Act, 1883, *s.* 18, *sub-ss.* 12, 13, *s.* 44 (i.).

A scheme of arrangement under sect. 18 of the *Bankruptcy Act*, 1883, whereby all the debtor's property is vested in a trustee for payment of the debts by instalments, passes only such property as the debtor is entitled to at the "commencement" of the scheme,—that is, at the date of its sanction by the creditors (reading sect. 18, sub-sect. 13, and sect. 44 (i.) together)—and up to the date of its approval by the Court, and does not, unless the scheme contains an express stipulation to that effect, include any after-acquired property of the debtor, such as a legacy bequeathed by the will of a testator dying subsequently to the date of the approval of the scheme by the Court, even though the debtor has not obtained a formal order of discharge; the approval of the scheme by the Court being equivalent to an order of discharge.

Ex parte Clark (1), discussed.

ADJOURNED SUMMONS.

On the 4th of May, 1888, *Henry Lance Croom*, a trader, filed a petition in bankruptcy in the *Poole* County Court, and on the same day a receiving order was made against him. Subsequently his creditors passed a resolution for a scheme of arrangement, and on the 16th of July, 1888, the scheme was duly approved by the Court. Under the scheme the whole of *Croom's* estate was vested in *Ernest Foreman* as trustee for the purpose of paying the debts in full with interest, by certain instalments; in case of failure to pay any instalment, the trustee was, within fourteen days, to proceed to realize the estate for the purpose of paying the creditors; also, the trustee was to be employed to carry on *Croom's* business under the supervision of a committee of inspection.

Croom having made default in payment of the instalments, the trustee took steps to realize the estate, and on the 22nd of

(1) 13 Q. B. D. 426.

KEKEWICH, J.
1891
In re CROOM.
ENGLAND *v.* PROVINCIAL ASSETS COMPANY.

February, 1889, he, with *Croom's* consent, entered into an agreement in writing with the *Provincial Assets Company, Limited*, for the sale to them of all his (*Foreman's*) estate and interest as trustee under the bankruptcy proceedings.

On the 10th of September, 1889, *Charles Croom*, the uncle of *H. L. Croom*, died, having by his will, dated the 27th of January, 1888, devised and bequeathed his residuary real and personal estate to trustees, upon trust for sale and to divide the proceeds equally between *H. L. Croom* and seven other persons. The share of *H. L. Croom*, after deducting a sum of £71 claimed to be retained by one of the trustees in discharge of a debt due to him from *H. L. Croom*, amounted to £306, and this sum was now in the hands of the trustees of the will.

By an indenture dated the 31st of December, 1889, and made between *Foreman*, the trustee of the one part, and the *Provincial Assets Company*, of the other part; after reciting the agreement of the 22nd of February, 1889, *Foreman*, in consideration of the purchase-money therein mentioned, granted and assigned to the company "all that the estate and interest of him the said *E. Foreman* of, in, and to the real and personal property vested in or belonging to the said *E. Foreman* as trustee under the said bankruptcy proceedings, to hold the same unto and to the use of the company for all the estate and interest of the said *E. Foreman* therein." On the same day one *Atkinson* obtained judgment against *H. L. Croom* for £116 and costs in a Queen's Bench action commenced by him (*Atkinson*) on the 17th of December, 1889.

It did not appear that the *Provincial Assets Company*, when they took their assignment, had any notice that the Queen's Bench proceedings had been, or were being taken, or were even contemplated.

The trustees of *Charles Croom's* will, having received notice of the respective claims of the judgment creditor and of the company under their assignment, took out this originating summons to have it determined to whom the £306 ought to be paid. No order for *H. L. Croom's* discharge had yet been pronounced in the bankruptcy proceedings. The question raised by the summons was whether *H. L. Croom's* interest under his uncle's will

passed under the assignment to the company, the uncle having died subsequently to the date of the approval by the Court of the scheme of arrangement.

S. Dickinson, for the summons.

Marten, Q.C., and *R. W. Harper*, for the *Provincial Assets Company*:—

We submit that our assignment operated to include every kind of property that might come to the debtor up to the date of his order of discharge, and therefore covered the debtor's interest under his uncle's will. This view seems in accordance with the provisions of the *Bankruptcy Act*, 1883. The enactments relating to compositions and schemes of arrangement commence with sect. 18, sub-sect. 12 of which provides that Part V. of the Act, relating to the duties of the trustee in bankruptcy, shall apply to the trustee under a composition or scheme, and sub-sect. 13 provides that Part III. shall apply to a composition or scheme. Turning to Part III., we find, in sect. 54, that on the appointment of a trustee "the property of the bankrupt" shall vest in such trustee; and in sect. 44 (i.), that "the property of the bankrupt" shall comprise all such property as may be acquired by or devolve on him before his discharge. In the present case the debtor has not yet obtained his discharge, and the receiving order has never been rescinded. The property passing to the trustee is not to be confined to property the debtor had at the date of the receiving order, for that is not a final order: *Edwards* v. *Edwards* (1). As regards the rights of the judgment creditor, he does not stand in any better position than the debtor himself; *bonâ fide* dealings with the debtor without notice before actual seizure by the judgment creditor are protected by sect. 1 of the *Mercantile Law Amendment Act* (19 & 20 Vict. c. 97).

G. Elliott, for *Atkinson*, the judgment creditor:—

I submit that inasmuch as the debtor's interest under his uncle's will did not accrue until his uncle's death on the 10th of September, 1889—that is, after the date of the approval of

(1) 2 Ch. D. 291.

KEKEWICH, J.

1891.

In re CROOM.

ENGLAND *v.* PROVINCIAL ASSETS COMPANY.

the scheme of arrangement by the Court—the interest did not vest in the trustee at all, and therefore could not pass by the assignment by the trustee of "all the estate and interest" vested in him "as trustee." It is true that under the *Bankruptcy Act*, 1883, the property of the bankrupt passing to his trustee comprises all property coming to him "before his discharge"; but when there is a scheme of arrangement, and not bankruptcy, the approval of the scheme by the Court is equivalent to and is in itself a discharge: *per Baggallay*, L.J., in *Ex parte Clark* (1).

[KEKEWICH, J.:—The question is whether there was a bankruptcy in existence at the moment of the testator's death, so that the benefit which then accrued to the debtor vested in his trustee.]

I say that when the testator died, on the 10th of September, 1889, there was no bankruptcy in existence, the previous approval of the scheme by the Court on the 16th of July, 1888, having operated as a discharge.

The statutory vesting in the trustee only operated upon property of the debtor up to the date of the approval of the scheme, or in other words up to his discharge, and therefore the trustee had no right or title to assign to the company property acquired by the debtor subsequently to that date.

Marten, in reply:—

The proposition that the approval of a scheme by the Court is equivalent to a discharge rests only upon a *dictum* by *Baggallay*, L.J., in *Ex parte Clark*. The observations of *Cotton*, L.J. (2), are inconsistent with that *dictum*, for he says that the discharge is a matter of a "separate application," and that, notwithstanding a scheme, the question of the debtor's discharge remains in the hands of the Court and depends upon the conduct of the debtor. The Court in fact retains its control over the debtor in order to see that the scheme of arrangement is duly carried out; if it is not, then under sect. 18, sub-sect. 1—a section substantially re-enacted in sect. 3, sub-sect. 15, of the *Bankruptcy Act*,

(1) 13 Q. B. D. 426, 435. (2) 13 Q. B. D. 436.

1890—the Court can, as for instance, in case of default in paying an instalment due under the composition or scheme, declare him a bankrupt and annul the scheme. There is nothing in the Act saying that the approval of the scheme by the Court shall be or operate as a discharge, and such an inference is opposed to the purview of the Act.

KEKEWICH, J.:—

The rights of the parties in this case necessarily depend on an examination of the words of the statute; but it is not out of place to consider the essential distinction between a liquidation by arrangement, composition, or scheme, and a bankruptcy. In bankruptcy there is a *cessio bonorum* by force of the statute. The contract between the bankrupt and his creditors has the seal of the statute: it derives its force from the statute; and one expects to find and does find that a much more operative power is given to that contract than would be given to it if it were a contract between parties under ordinary circumstances. The debtor is bound to hand over—that is to say, the statute takes out of him and hands over—not only the property vested in him at the moment, but also that to which he becomes entitled so long as the bankruptcy continues, and that is all appropriated for payment of his creditors; and there are many other provisions in the statute which obtain their force simply from the statute, and which you would not expect to find in an ordinary contract. On the other hand, a liquidation by a scheme of arrangement, though sanctioned by the statute and according to the statute and the rules made thereunder, is, after all, only a contract between the parties; and one approaches a contract between parties from a somewhat different point of view from that from which one regards a mere statutory provision. One would not expect to find, in the case of parties contracting, that any definite act on a given day should operate to vest in any of the parties, or a trustee for them, property not then in existence, but acquired at some future date. The parties might make any contract they pleased that it should be so; but it is obvious that, without the statute, no words used in any agreement, whether under seal or not, would vest in any person as trustee, or not as

KEKEWICH, J. 1891 *In re* CROOM. ENGLAND *v.* PROVINCIAL ASSETS COMPANY.

trustee, property not yet belonging to one of the parties, but which might belong to him at a future time. I think we ought to keep those things in mind.

Then I turn to the statute itself, the *Bankruptcy Act*, 1883. Sect. 18 provides for a composition or scheme of arrangement, and it provides what may be done in that way, how it is to be arrived at by the creditors with the debtor, and, having been arrived at between them as matter of contract, how it is to be approved by the Court, and controlled and worked out by the Court. It does not specify in so many words what property is to belong to the trustee for the creditors, for the very reason that it may be that there is no property at all which is to belong to him; and still less could the Legislature foresee what particular property the creditors should insist on taking from the debtor, or, as not unfrequently happens, those of his friends who assist him in his difficulties. That is a matter of contract between the parties; and, provided they bring themselves within the language of the statute, or that which the statute says may be done, the scheme is approved and takes effect under the statute.

Again, the statute does not say when the debtor shall be discharged from his debts: there is nothing in express terms that I can find equivalent to a provision for discharge. That seems to have been left—and the case to which I shall presently refer supports that view—to the discretion of the creditors. They are to say, not only what property is to pass to the trustee to be administered for their benefit, but also when they will be so satisfied with the provision made for payment of their debts as to turn him out a free man again to trade and contract other debts, discharged from his liability to them. Some sub-sections of sect. 18 have reference to other parts of the Act; and I follow the application by Mr. *Marten* of sub-sects. 12 and 13 to sect. 44, except as regards this—that there is nothing in sub-sects. 12 or 13 referring to the order of discharge; and I think, reading in sect. 44 (i.), that what is meant in sub-sect. 13 by the "commencement" of the composition or scheme of arrangement must be the time when the composition or scheme of arrangement is sanctioned by the creditors. It is from that time that it commences. That would seem to be right in itself;

but I think I cannot adopt the view that it means the time of the order approving the composition or scheme of arrangement, because that order is expressly made by sub-sect. 12 of sect. 18 equivalent to an order of adjudication.

Then, what is to be done when the scheme is sanctioned by the creditors? It is then to be submitted to the Court, and the Court is to see whether the terms are reasonable. One knows that that is provided in order to prevent collusion, or other impropriety, and to ensure that no scheme shall have the approval of the Court unless it makes a fair provision for the debts, having regard to the debtor's property and all the circumstances of the case, upon a basis which is reasonable and calculated to benefit the general body of creditors. The Court is directed to withhold its sanction if any facts are proved which shew that the debtor, if he were a bankrupt, would not be entitled to his order of discharge; and, to ascertain the way in which that is to be done, reference must be made to sect. 28, which tells us what justifies the Court in withholding the order of discharge. But beyond that there is no express provision that the approval shall be equivalent to the order of discharge. At the same time, it is almost implied in that provision that the Court is, on the occasion when it is asked for its approval, to determine whether the debtor has or has not been guilty of any of these acts which, if he were a bankrupt, would, if proved, have disentitled him to his order of discharge.

The only other section to which I think it necessary to refer, after having studied the Act to the best of my ability, is sect. 44, which says, in sub-sect. (i), that the property of the bankrupt divisible amongst his creditors shall comprise, "All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge." Now, unless I have got something directly equivalent to "before his discharge," I think I am thrown back on the contract between the parties, construed, of course, with reference to the statute and the bankruptcy law in general. The contract is that the whole of the debtor's estate is to be assigned to Mr. *Foreman* as trustee, and that the debts are to be paid in full by certain instalments; and that, in the

KEKEWICH, J. 1891 *In re* CROOM. ENGLAND *v.* PROVINCIAL ASSETS COMPANY.

case of failure to pay any instalment, the trustee is, within fourteen days, to realize; and, of course, it is to be borne in mind that there is a large power behind in the event of the debtor not doing what he is obliged to do under the scheme—a power of revoking the scheme so that bankruptcy may supervene. That points to a contract between the parties that, the debtor having made a statement of what he has which is available for payment of his debts, and the creditors having met and considered what the debts are, the parties agree to a composition—a composition which, in this case, although it is to result eventually in the payment of twenty shillings in the pound, is still none the less a composition, because the creditors are not to be paid a sum down in full of their claims, but time is to be given, and that is an important part of a compromise. The creditors are to be paid in that way, because, on a review of the whole matter, they are satisfied that the property vested in the trustee is enough to pay them in that way. That seems to me to exclude the notion of property coming to him at a future time. The estimate is made on what he has then; and that might include, and probably would include, a reversionary interest, whether vested or contingent, but cannot, as it seems to me, include a mere expectancy. The estimate is framed on the estate then available for payment of debts. All that seems to me to shew that, when this is sanctioned and when it becomes binding, then, the Court having, by force of the statute, considered whether the debtor would be entitled to his order of discharge or not, he is discharged and is a free man.

This seems to me the necessary result of the consideration of these sections, though, I repeat, we do not find any express provision in the Act that any particular event should operate as an order of discharge. Whether I should have had the courage so to construe the *Bankruptcy Act* on a novel point if my view were unsupported by authority it is unnecessary to say, for I have what, to my mind, is distinct authority upon the point, not forgetting that what was said by Lord Justice *Baggallay* was not necessary to the decision of the question in *Ex parte Clark* (1). The only point there really before the Court was

(1) 13 Q. B. D. 426.

this: there was a scheme which, though it may be assumed to have been in all other respects a scheme which ought to be approved, provided that the debtor should be discharged when the committee of inspection should so resolve; that is, that the discharge of the debtor should be left in the discretion of the committee of inspection. That was really the provision on which the whole of the argument turned: and the Court held unanimously, without any difference of opinion at all, that that was wrong; that the creditors could not delegate their discretion to the committee of inspection; that the Court could not sanction the delegation to the committee of inspection of the discretion as to the time when the debtor should be discharged. But Lord Justice *Baggallay*, criticising the Act on the point whether that was what the Act referred to or not, stated his opinion distinctly (1) that the approval of the scheme was equivalent to a discharge. I will not read the passage at length. He goes through the several sections of the Act, refers to them all, and gives that as his opinion. It is obvious that he thought, and it is not out of place to observe, that the scheme might itself fix a subsequent time. He says (2): "It appears to me that it"—that is, sub-sect. (i) of sect. 44—"contemplates that the discharge may possibly occur at a period subsequent to the commencement of the scheme, and that any property coming to the debtor before that period will be available for distribution among the creditors"; and that follows his conclusion that sect. 44, sub-sect. (i), read by the aid of sub-sect. 13 of sect. 18, amounts, in the case of a scheme of arrangement, to this, that the property of the debtor divisible among his creditors shall comprise "all such property as may belong to or be vested in the debtor at the date of the order approving the scheme, or may be acquired by or devolve on him before his discharge." That is to say, if there is no other time provided, then the order approving the scheme fixes the time. If a future time is provided, the debtor may be discharged at that future time. Property which he acquired before the discharge will come in: that I understand to be his position under the statute. Nobody has contested what that position is; there is no question about it. But it is said that that opinion

(1) 13 Q. B. D. 435. (2) 13 Q. B. D. 434.

KEKEWICH, J.

1891

In re CROOM.

ENGLAND *v.* PROVINCIAL ASSETS COMPANY.

expressed by Lord Justice *Baggallay* was unnecessary for the decision of the case—as it, in fact, was—and that the other Lords Justices do not agree with him. I have carefully read their judgments, and, though I see they do not express their agreement with him, yet they do not say a word to the contrary. Lord Justice *Cotton* says (1): "I am of opinion that a provision that the debtor should assign his after-acquired property to a trustee for the benefit of his creditors would be unobjectionable." Even without giving the Lord Justice credit for the extreme accuracy which he was careful to maintain, I cannot understand what he could possibly mean by such an expression as that if he did not think that, in order to include after-acquired property in an assignment by the debtor, there must be an express provision for that purpose. Then, again, a little further on, he says: "It is not that the order approving the scheme is of itself necessarily equivalent to an order of discharge, but the Court is to have in its hands the control of the question whether the debtor is a person who ought to have a discharge." That exactly agrees with what Lord Justice *Baggallay* said. That is to say, if there is nothing else, then the approval of the scheme is equivalent to an order of discharge. It is not necessarily so, because it may be part of the bargain that some other time should be fixed. Then, further down, Lord Justice *Cotton* says, referring to sect. 18: "That section, I think, contemplates that the creditors shall give the debtor his discharge, either immediately or at some defined time, subject, of course, to the approval of the Court." That is to say, the time for the discharge is to be fixed by the creditors, subject only to the approval of the Court. If the creditors choose, as part of the bargain, to remit the discharge to a future time, it is within their power to do so. The point is that the time for the discharge is to be fixed by the creditors, subject to the approval of the Court, and that discretionary power is not to be handed over to anyone else.

The judgment of Lord Justice *Lindley* points exactly the same way. He says (2): "One of the provisions of this scheme is that the debtors are not to be discharged until the committee of inspection shall think fit. What is the effect of that? I am very much

(1) 13 Q. B. D. 436. (2) 13 Q. B. D. 437.

perplexed by it. The scheme hands over to the committee of inspection the determination of the time at which the debtors shall be discharged. So long as the discharge is in suspense the position both of the debtors and of the creditors is uncertain and embarrassing. It appears to me that this is not consistent with the general scheme of the Act." That is to say, it is to be ascertained from the scheme when the discharge is to take place, and under what circumstances, as between the creditors and the debtor. "It is said"—the Lord Justice adds—"that the only effect is to hand over the debtors' after-acquired property to the creditors. I think that might be done much better in another way." Of course the Lord Justice means exactly what the Lord Justice *Cotton* had said—that a provision that the debtor should assign his after-acquired property to the trustee would be unobjectionable.

Therefore, I find both these judgments supporting the view of Lord Justice *Baggallay*; and it certainly is my view, on studying the Act for this purpose, that unless the creditors stipulate and the debtor assents, with the approval of the Court, that after-acquired property shall be brought in, after-acquired property is not brought in. That contract may be made; if made it is unobjectionable and may be enforced; but if not—if there is no such provision—then what the debtor has and what he contracts to make over to the creditors is the same thing, and this is what the trustee takes.

Therefore, I find my view of the statute entirely supported by the judgments in the case cited—not by one of them, but by all three; and I hold that this scheme only operated to convey to the trustee what the debtor was entitled to at the date of the approval of the scheme by the Court, when it became completely operative. That being so, this legacy, which was not known to exist until the death of the testator some time afterwards, did not vest in the trustee, and there is nothing operating to assign it to the *Provincial Assets Company*, who took from the trustee only what he had power to assign, and therefore their case on this point fails.

Marten, for the company, then read an agreement under seal,

KEKEWICH, J. 1891 *In re* CROOM. ENGLAND *v.* PROVINCIAL ASSETS COMPANY.

dated the 27th of January, 1890, and made between *H. L. Croom* of the first part, the *Provincial Assets Company* of the second part, and *Edward Bicker* and *Henry Charles Bicker* of the third part, whereby, after reciting the bankruptcy proceedings, and that *H. L. Croom* would, except for the scheme of arrangement, be entitled under the will of his uncle to an interest in his estate, "and which said interest is, by virtue of the said scheme of arrangement, now vested in the company, as the said *H. L. Croom* hereby admits," it was agreed that such interest should be received by the company, who, after realizing the same, should pay the net proceeds to the Messrs. *Bicker* for distribution among such of the creditors of the said *H. L. Croom* to whom he had incurred debts since the scheme as the company should direct. It was argued that this agreement was binding upon *H. L. Croom*, and that as, according to his Lordship's judgment, the legacy did not pass by the scheme of arrangement and the assignment by the trustee, it did pass to the company by the present agreement.

G. Elliott, for the judgment creditor, contended that effect ought not to be given to the agreement, inasmuch as it had been executed under the impression, now shewn by his Lordship's judgment to have been erroneous, that the legacy had passed to the trustee under the scheme. Notwithstanding *H. L. Croom's* admission, the Court ought not to give effect to an instrument executed under a mistaken view of his rights.

KEKEWICH, J.:—

I do not see how, on the present application, I can get over the admission that has been made under seal, as to which I will not say anything more at present. The judgment creditor takes nothing except through *H. L. Croom*, and as long as this admission stands both he and *Croom* are bound. I will give *Croom* an opportunity of taking such proceedings as he may be advised in order to have the agreement set right. The order will, therefore, direct payment of the fund in the hands of the trustees of the will (after deducting their costs) to the company, not immediately, but at the expiration of fourteen days after

service by the trustees of the present order upon the respondent *H. L. Croom*. There will be no order as to costs.

KEKEWICH, J.
1891
In re CROOM. ENGLAND *v.* PROVINCIAL ASSETS COMPANY.

Solicitors: *Winter & Co.*, agents for *Mooring, Aldridge & Haydon, Bournemouth; Ramsden, Radcliffe & Co.*, agents for *Ramsden, Sykes, & Ramsden, Huddersfield; Peacock & Goddard*, agents for *J. H. Ralph Smythe, Bournemouth.*

G. I. F. C.

In re MABBETT. PITMAN *v.* HOLBORROW.

KEKEWICH, J.
1891
Jan. 22, 23, 31.

[1890 M. 2588.]

Annuity—Life Annuity charged on Land—Trustees empowered to sell Land and purchase Government Annuity—Right to receive Value of Annuity—Death of Annuitant before Completion of Sale by Trustees.

A testatrix by her will bequeathed life annuities charged on land and, subject to the annuities, devised the land to trustees on trust for sale. By a codicil she empowered the trustees to purchase Government annuities for the annuitants, such Government annuities, if purchased, to be in place of the annuities given to them respectively, and directed that the purchase-money should be a first charge on the proceeds of sale of the land, and that upon purchase of the Government annuities the land should be discharged. The trustees proceeded to sell the land; the sale was completed and, pursuant to the conditions of sale, a sufficient sum of money was deposited in a bank for the purchase of the Government annuities, but such annuities were not actually purchased. One of the annuitants died after the contract of sale was entered into, but before completion or payment of the purchase-money. Another annuitant had subsequently died:—

Held, that the legal personal representative of the annuitant who died before completion was not entitled to receive from the trustees the value of her annuity; but that the legal personal representative of the other annuitant was so entitled.

ADJOURNED SUMMONS.

Mary Mabbett, by her will, dated the 14th of November, 1889, after appointing the Defendants, *Isaac Holborrow, Thomas Hillier* and *James Gordon Wenden*, executors and trustees, gave certain annuities, which she charged on specified parts of her real estate, including an annuity of £10 per annum to *Mary Reed* for her

KEKEWICH, J. 1891 *In re* MABBETT. PITMAN *v.* HOLBORROW.

life, an annuity of £20 per annum to *John Reed* for his life, and annuities to *Thomas Hooper* and others during their respective lives, and subject to such annuities the testatrix devised the real estates charged therewith to her trustees upon trust to sell the same and divide the proceeds of sale as therein mentioned. The testatrix devised and bequeathed her residuary real and personal estate to her trustees upon trusts for sale and conversion, and division of the net proceeds as therein mentioned, and in particular directed that one-fifth of one-third part of such net proceeds should be invested and the income thereof paid to *Sarah Pitman* during her life, and on her decease, one half of the capital should be laid out in the purchase of a Government annuity for *Frances Pitman*, and the remaining half in the purchase of a similar annuity for *Louisa Pitman*, and in the event of either of them dying in the lifetime of *Sarah Pitman* (who was their mother), the whole, instead of the half of such capital, was to be laid out in the purchase of a Government annuity for the survivor of them. The testatrix declared that, in case any of the annuitants should alien, charge, or anticipate his or her annuity, or any part thereof, such annuity should wholly cease, as if such annuitant were dead, and she also declared that none of the annuitants should be allowed to accept the value of his or her annuity in lieu thereof.

By a codicil, dated the 23rd of November, 1889, the testatrix gave an annuity of £10 per annum to *Frances Pitman* for her life, and charged the same on specified real estate, and gave a like annuity to *Louisa Pitman*, and charged the same on other real estate, and proceeded to direct as follows:—"I declare that my trustees may purchase Government annuities for the annuitants named in my will or any codicil thereto for the respective amounts of the annuities given to them by my will or any codicil thereto; such Government annuities, if purchased, to be in place of the annuities given by my will or any codicil thereto, and the purchase-money of such Government annuities, and the legacy duty thereon, and all charges and expenses connected with the purchase thereof, to be provided out of and to be the first charge upon the proceeds of sale of the respective estates upon which the said annuities are respectively charged, and the

said estates upon the purchase of Government annuities to be respectively discharged from the payment of the annuities respectively charged thereon."

The testatrix died on the 18th of May, 1890, and her will and codicil were duly proved by the Defendants *Holborrow*, *Hillier*, and *Wenden*.

Mary Reed died in the month of September, 1890, and was buried on the 21st of that month. No representation had been taken out to her. Her annuity was paid down to the date of her death.

The real estate charged with the annuities of *Mary Reed*, *John Reed*, and *Thomas Hooper*, and with the annuity given by the codicil to *Louisa Pitman*, was by direction of the trustees put up for sale by auction in lots, and sold on the 7th of August, 1890. By the conditions of sale it was provided that the vendors should purchase Government annuities in place of the annuities charged on the properties comprised in the sale, thereby discharging such properties from such annuities. The vendors were to produce the respective certificates of the purchase of such Government annuities to the purchaser of each lot upon completion, but if from any cause such Government annuities should not have been purchased before completion, the purchase-money, or so much as should be sufficient to purchase the annuities, was to be paid into a bank. The date fixed for completion was the 29th of September, 1890.

All the purchases were completed on or within a few days after the 29th of September, 1890. The Government annuities were not purchased; but in accordance with the conditions of sale the sum of £1400 was placed on deposit in a bank. Of this sum £830 was the amount estimated to be requisite for the purchase of the annuities, and the balance was deposited in order to answer duty and costs.

John Reed died on the 3rd of October, 1890, and the Defendant *Daniel Reed* was the executor of his will.

The real estate charged with the annuity given by the codicil to *Frances Pitman* had not been sold.

This was an originating summons by *Sarah Pitman*, *Frances Pitman*, and *Louisa Pitman*, as Plaintiffs, against the trustees of

KEKEWICH, J. 1891 *In re* MABBETT. PITMAN *v.* HOLBORROW.

the will and *Thomas Hooper* and *Daniel Reed*, as Defendants, asking (*inter alia*) for administration of the residuary real and personal estate of the testatrix, and for declarations as to the rights of the Plaintiffs, and of the Defendants *Hooper* and *Reed*, and in particular that *Louisa Pitman*, *Thomas Hooper*, and *Daniel Reed* were respectively entitled to receive from the trustees the value of the annuities given by the testatrix to *Louisa Pitman*, *Thomas Hooper*, and *John Reed*.

Upon the hearing of the summons, the question was raised whether or not the representative of *Mary Reed*, when constituted, would be entitled to receive the value of her annuity, she having died as above-mentioned pending the completion of the sale; and *Daniel Reed* was appointed by the Court to represent her estate for the purposes of the argument.

Warmington, Q.C., and *Badcock*, for the Plaintiffs, submitted that the directions in the will that in case of an annuitant alienating his annuity, such annuity should cease and determine, and that no annuitant should be allowed to receive the value of his annuity were inoperative; *Hatton* v. *May* (1), *Hunt-Foulston* v. *Furber* (2), and *Roper* v. *Roper* (3); and therefore the Plaintiff, *Louisa Pitman*, was entitled to receive the value of the annuity given to her by the codicil.

Dibdin, for *Thomas Hooper* (who was also appointed by the Court to represent the other annuitants under the will with the exception of *Mary Reed* and *John Reed*), referred to *Stokes* v. *Cheek* (4).

Upjohn, for *Daniel Reed*:—

By virtue of the proviso in the codicil empowering the trustees to purchase Government annuities, *Mary Reed* and *John Reed* became, in the events which have happened, entitled to receive the value of their respective annuities. Where trustees are directed by a testator to purchase a Government annuity for the benefit of a person, the annuitant is entitled to have the value of the annuity paid to him, and this right becomes vested in him

(1) 3 Ch. D. 148.
(2) Ibid. 285.
(3) 3 Ch. D. 714.
(4) 28 Beav. 620.

at the death of the testator, and subsists though the annuitant dies before the money is ready for the purchase: *Yates* v. *Compton* (1), *Palmer* v. *Craufurd* (2); and although the annuity is to commence *in futuro*, the period of enjoyment being regarded as deferred with reference to the circumstances of the estate and not to those of the annuitant: *Bayley* v. *Bishop* (3); and it is immaterial whether a sum certain is given, or there is merely a direction to purchase an annuity of a particular amount: *Dawson* v. *Hearn* (4).

Marten, Q.C., and *Daldy*, for the trustees of the will and residuary legatees and devisees:—

The representatives of the deceased annuitants must fail, since they have not shewn an indefeasible right vesting in the lifetime of either of the annuitants.

In the cases cited on their behalf there was either an express trust, or, as in *Dawson* v. *Hearn*, an absolute direction for the purchase of the annuity, and there can be no doubt that in such a case the annuitant has an immediate vested right to receive the money. But the present case is that of a mere discretionary power conferred on trustees, and there can be no right vested in any annuitant until such power is exercised in his favour. It is submitted that the power was not so exercised in the case of either of the annuitants, *John Reed* and *Mary Reed*, as no Government annuities were purchased, nor any specific sum of money appropriated or set apart by the trustees in respect of either of their annuities. If, however, it is considered that the power was exercised on completion of the purchase when the money applicable for purchase of the Government annuities was received, so that the representatives of *John Reed* are let in, yet those of *Mary Reed*, who died before completion, cannot take anything. There are no decided cases directly in point, but *Power* v. *Hayne* (5), disapproving *Day* v. *Day* (6), and *In re Draper* (7), in which *Power* v. *Hayne* was followed, are authorities in our favour.

(1) 2 P. Wms. 308.
(2) 3 Swanst. 482.
(3) 9 Ves. 6.
(4) 1 Russ. & My. 606, 609, 613.
(5) Law Rep. 8 Eq. 262.
(6) 1 Drew. 569.
(7) 57 L. J. (Ch.) 942.

KEKEWICH, J.
1891
In re MABBETT.
PITMAN v. HOLBORROW.

Upjohn, in reply, as regards the case of *Mary Reed*:—

When the contract for sale was entered into the power of the trustees under the codicil was exercised, and thereupon *Mary Reed* became entitled to call upon the trustees to pay to her in cash the value of her annuity out of the purchase-money.

[KEKEWICH, J.:—She was not a party to the contract and could not enforce it.]

There might have been a difficult question if the trustees had rescinded the contract, because of the default of the purchaser, and it might have been said that on a second sale it was open to them to exercise their discretion *de novo*. But that is not the case. They exercised their discretion on the 7th of August, 1890, in the lifetime of *Mary Reed*, and upon that day she became entitled to receive the value of her annuity.

KEKEWICH, J. (after referring to the will and codicil and dealing with questions of construction not material to this report continued as follows):—

It has been settled for a long time that if a Government annuity is given to a person by will, that is to say, if trustees are directed to purchase a Government annuity for the benefit of any given person, that person may intercept the money and say, "The £100 or whatever it is which you are going to lay out for my benefit shall be paid direct to me." The annuitant could sell the Government annuity, and the Court will not put him to the necessity of doing that, but gives him a right to the money. That is laid down in several cases, one or two of which I will refer to on another point; but I think the explanation of the doctrine is to be found in the words of the Master of the Rolls in *Stokes* v. *Cheek* (1). He says, "I have on several occasions held, that annuitants are entitled to receive the money necessary to purchase their annuities. It would be an idle form to direct an annuity to be purchased, which the annuitants might sell immediately afterwards." So that if I find a person entitled to a Government annuity when purchased, I am bound to hold he may intercept the purchase-money and order it to be paid to

(1) 28 Beav. 620.

him. But as regards annuities charged on property of a testator or payable out of his assets as distinguished from a Government annuity, the testator may impose conditions, and it would be possible even to impose conditions on a Government annuity, though the language would require to be somewhat different. Thus the testator may provide that until certain events happen the annuity shall continue; but that on the happening of such events the annuity shall come to an end. Of course the provision must not be repugnant to the gift so as to be void on that ground; but so long as it does not offend against that rule, a provision defeating an annuity in certain events is good and will be upheld. The provision may be expressed in more than one form. It may take the form of a conditional limitation, which is no doubt the more appropriate and correct, or it may take the form of a proviso by way of defeasance, which, though not so correct, would be construed by the Court as a conditional limitation. Then I have to consider this, that a proviso such as I find in this will expressed merely *in terrorem*, that is to say, without any gift over, is not allowed to take effect. That point came before *Malins*, V.C., in *Hatton* v. *May* (1), and was again considered by *Hall*, V.C., in *Hunt-Foulston* v. *Furber* (2), which I only refer to because it was suggested, though in my opinion erroneously, that that case is inconsistent with *Hatton* v. *May*. The case of *Hatton* v. *May* was referred to again by *Malins*, V.C., in *Roper* v. *Roper* (3), and this is the Vice-Chancellor's own explanation of his previous decision (4), "I laid down the rule on that subject in the recent case of *Hatton* v. *May*, that where there is merely a declaration that the widow shall not have the value of her annuity, that goes for nothing; but in order to prevent her having the value there must be a gift over." I think there is one more consideration which I must bear in mind in disposing of the case. The right of the annuitant to the money accrues so soon as the money is available for the purchase of the Government annuity, and equity, treating that as done which ought to be done, considers it available even though the estate out of which it is to be purchased has not been sold, provided there is a

(1) 3 Ch. D. 148.
(2) Ibid. 285.
(3) 3 Ch. D. 714.
(4) Ibid. 721.

KEKEWICH, J.
1891
In re MABBETT. PITMAN *v.* HOLBORROW.

direction for sale amounting to conversion, so that the legatee takes through the medium of the Government annuity a share of the proceeds of sale, the property being treated as immediately sold. That is neatly expressed in *Palmer* v. *Craufurd* (1), where the Master of the Rolls, Sir *Thomas Plumer* (2), says, "The cases of *Bayley* v. *Bishop* (3), *Yates* v. *Compton* (4), and *Barnes* v. *Rowley* (5), have established, that where money is bequeathed to be invested in the purchase of an annuity for the life of the legatee, and the legatee dies before it is laid out, or even, as in *Bayley* v. *Bishop*, before the fund is available, as during the life of the person after whose death the investment is to be made, yet still it is a vested legacy from the death of the testator; and that the legatee for whose benefit it was intended, having survived the testator, may elect either to take the sum, or have it laid out in an annuity."

[His Lordship proceeded to deal with the case so far as related to the annuities given by the will to *Frances* and *Louisa Pitman*, and after referring to the direction in the will that the annuitants should not be allowed to accept the value of their annuities, continued:—]

That provision is either repugnant to the absolute gift to them, or even supposing it is not repugnant it is void for want of any gift over to perfect it. In either point of view it does not prevent *Frances* and *Louisa Pitman* receiving their shares of the residue in respect of their annuities, to which I hold they are absolutely entitled.

[His Lordship then referred to the case of the annuitants other than *Mary Reed*, and having stated that upon the principles which he had indicated there was no answer, in his opinion, to their demands to receive the value of their annuities, continued:—]

When the sale of the property was completed they were entitled to intercept the money which would go to purchase the Government annuities and require it to be paid to them. This applies to the annuity of *John Reed*, who is represented by

(1) 3 Swanst. 482.
(2) Ibid. 487.
(3) 9 Ves. 6.
(4) 2 P. Wms. 308.
(5) 3 Ves. 305.

Mr. *Upjohn*; but another of the annuitants, *Mary Reed*, died before the completion of the purchase, and the argument on her behalf is that, according to the principle laid down in *Palmer* v. *Craufurd* (1), she became entitled, as much as any other of the annuitants, to the value of her annuity. There was a binding contract for sale between the trustees and the purchaser. They by their contract agreed that money was to be received and invested in this way, so that the Government annuities might be purchased, that is to say, so that the legatee or annuitant might receive the money if he or she chose to intercept it, and all that was done before this lady died, but she did not survive the actual completion. The money was not received until after her death, and under those circumstances it seems to me that the principle fails to apply. All the cases are cases of trusts for sale. The best example of the principle perhaps is the earliest case of *Yates* v. *Compton* (2), where there was a devise for sale, and all the other cases are of the same character, and the rule laid down in *Palmer* v. *Craufurd*, referring to *Bayley* v. *Bishop* (3), is also a very good example. They proceeded upon this that there was a direction for sale, and that nothing could prevent the money being realized, so that it should ultimately become receivable. But here though, no doubt, all persons contemplated that the money would be received under the contract, and if everything had gone on as expected, it would have been so received, still we have the accident, the act of God, by which the annuitant was not there to receive her annuity at the time when the money was received. I cannot say that the trustees might not have varied the contract. Of course they could not do it without the agreement of the purchaser, because the contract was binding on both; but so far as this annuitant was concerned there might have been a variation. The trustees might have said that seeing that the annuitant was dead or even dying, they would vary the contract for the benefit of the estate; and that they would not require a sum to be set apart to provide for the purchase of the annuity; or they might before her death have made some variation in her favour as regarded the payment of the purchase-

(1) 3 Swanst. 482. (2) 2 P. Wms. 308.
(3) 9 Ves. 6.

KEKEWICH, J. 1891 *In re* MABBETT. PITMAN *v.* HOLBORROW.

money. But the contract was not enforceable by the annuitant herself. If it had been that would have made all the difference, and would have brought this case within the authority of the cases which have been referred to. But here, as the contract was not enforceable by the legatee herself, I do not think I can say that there was any vested right in her to receive the money. That being so, I think that her annuity must be regarded as having ceased.

Solicitors: *Crowders & Vizard*, agents for *Vizard, Wenden, & Macdonald, Dursley; S. W. Johnson & Son; Bridges, Sawtell, Heywood & Co.*, agents for *Chanter & Co., Wotton-under-Edge.*

C. C. M. D.

KNOWLES *v.* SCOTT.

ROMER, J.

1891

Feb. 19, 20.

[1889 K. 921.]

Company—Voluntary Winding-up—Liquidator—Liability of—Trustee—Agent—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 138 [*Revised Ed. Statutes, vol. xiv., p.* 233].

A liquidator is not strictly speaking a trustee either for the creditors or the contributories of a company in liquidation, his position being that of agent of the company.

Therefore, in the absence of fraud, *mala fides*, or personal misconduct, an action for damages will not lie against a liquidator at the suit either of a creditor or contributory for delay in paying the creditor's debt, or in handing over to the contributory his proportion of the surplus assets of the company.

Dicta of *Selborne*, L.C., in *Black & Co.'s Case* (1), and of *James*, L.J., in *In re Oriental Inland Steam Company* (2) and *In re London and Caledonian Marine Insurance Company* (3), explained.

THE Plaintiff in this action was a shareholder in a company known as the *Leeds Forge Company, Limited*, and the Defendant was the liquidator of the company, which was being wound up voluntarily with a view to its reconstruction.

This company (hereafter referred to as the *Old Company*) had transferred all its business and assets to a company which had been incorporated on the 5th of January, 1889, under the name of the *New Leeds Forge Company*, in consideration of a cash payment and a transfer of fully paid-up shares in the *New Company*.

The Plaintiff was entitled, in respect of his holding in the *Old Company*, to 400 fully paid-up ordinary shares in the *New Company*, and also to a cash bonus of £6 per share.

The liquidator received the cash from the *New Company* in the first three months of 1889, and the shares in the *New Company*, to which he was entitled as such liquidator, were held at his disposal as from March, 1889; and on the 5th of April, 1889, he made his first transfer and payment to shareholders of the *Old Company* of the shares and cash payable to them.

The case alleged by the Plaintiff (and which for the purpose of the judgment may be taken to have been proved) was that he,

(1) Law Rep. 8 Ch. 254. (2) Law Rep. 9 Ch. 557.
(3) 11 Ch. D. 140.

ROMER, J. 1891 KNOWLES v. SCOTT.

or his solicitors on his behalf, had ever since the 16th of March, 1889, made frequent applications to the liquidator for the shares and cash attributable to him, as he was desirous of selling them, the shares having risen to a considerable premium; that the liquidator had declined to accede to his application on the ground that 200 out of the 400 shares, and the bonus attributable to them, were the subject of a litigation then pending between the Plaintiff and a Mr. *Fox*, and that the liquidator could not deal piecemeal with the Plaintiff's shares; and, notwithstanding that the Plaintiff insisted on his right to the 200 shares which were unaffected by the litigation, and the bonus attributable to them, and offered to give the liquidator an indemnity in respect thereof, the liquidator refused to pay the cash or transfer the shares. The Plaintiff accordingly issued his writ on the 8th of November, 1889, and delivered his statement of claim on the 14th of December, 1889, claiming a declaration that the Defendant was a trustee for the Plaintiff of the 200 shares, and of all dividends declared up to that date in respect of those shares, and also of the £1200 bonus, and an order on the Defendant to transfer and pay the shares, and cash, and damages.

On the 21st of January, 1890, the Plaintiff received from the liquidator a certificate for the 200 shares, and also the sum of £1200, and a further sum of £97 10*s.*, representing an *interim* dividend received in respect of those 200 shares, and the action, therefore, was reduced substantially to an action for damages against the Defendant.

The Plaintiff adduced evidence shewing that the shares had fallen considerably in value since the summer of 1889.

The Defendant by his defence submitted that he was entitled to a reasonable time after receipt of the shares and cash payable by the *New Company* within which to distribute the same among the shareholders of the *New Company*, and that he had made the necessary transfers and payments within a reasonable time; and further alleged that he had never held or claimed to hold the shares or bonus, or to have any interest therein, except as liquidator, and that he had acted *bonâ fide* in the interest and as agent of the *Old Company*, and submitted that he was under no personal liability to the Plaintiff.

Haldane, Q.C., and *W. D. Rawlins*, for the Plaintiff:—

This action, although no doubt a novel one, is founded on the general principle that, where a person undertakes some duty in respect of another's property, and fails to perform that duty, he is liable to the person injured by such failure, notwithstanding that he be not guilty of any *mala fides;* among others trustees of a bankrupt, or a receiver: *Lewin* on Trusts (1). The Defendant, by accepting the office of liquidator, became bound to obtain the shares and cash from the *New Company*, and to hand them over to the shareholders of the *Old Company*, and as soon as he received them he occupied the position of trustee in respect of them, and it will be no more an answer for him, than it would be for a trustee, to say that he made a mistake as to the legal rights of the Plaintiff. In several cases a liquidator has been spoken of as a trustee and the property of a company in liquidation as trust property: see *per James* and *Mellish*, L.JJ., *In re Oriental Inland Steam Company* (2); and *per* Lord *Selborne*, L.C., in *Black & Co.'s Case* (3), where he refers to a liquidator as a "statutory trustee"; and again, in *In re London and Caledonian Marine Insurance Company* (4), *James*, L.J., appears to consider that a liquidator who has wilfully and knowingly left the debt of a creditor unpaid may be personally liable to such creditor on the ground of the violation of a statutory duty, and undoubtedly liable if guilty of *mala fides*, dishonesty, or fraud.

This action, as originally started, was analogous to an action of detinue, and the damages must be assessed on the principles applicable to such action, and the measure of damages to which the Plaintiff is entitled is the difference between the price of the shares when first distributable and when they were in fact received by the Plaintiff: *Williams* v. *Archer* (5); *Williams* v. *Peel River Land and Mineral Company* (6); and interest on the bonus and dividends: 3 & 4 Will. 4, c. 42, s. 28, and *Meredith* v. *Bowen* (7).

(1) 8th Ed. Chap. XIV. s. 5, p. 338.
(2) Law Rep. 9 Ch. 557, 559, 560.
(3) Ibid. 8 Ch. 254, 262.
(4) 11 Ch. D. 140.
(5) 5 C. B. 318.
(6) 55 L. T. (N.S.) 689.
(7) 1 Keen, 270.

ROMER, J.
1891
KNOWLES
v.
SCOTT.

Chadwyck Healey, Q.C., *Grosvenor Woods*, and *W. B. Lindley*, for the Defendant:—

No precedent for such an action as this can be found, and for the reason that no such action lies against a liquidator. The liquidator is the agent of the company: *In re Anglo-Moravian Hungarian Junction Railway Company* (1); and it is well-established law that no action lies against the agent of a disclosed principal for mere negligence or omission, the action must be brought against the principal, except in the case of some active misfeasance on the agent's part: *Story* on Agency (2); *Lane* v. *Cotton* (3). Here, assuming negligence on the part of the liquidator (for no fraud or *mala fides* is charged), the company should have been made Defendant, and that this is the practice is recognised in *De Rosaz* v. *Anglo-Italian Bank* (4); so a liquidator sues in the name of the company: *Companies Act*, 1862, s. 95.

A liquidator is not properly speaking a trustee, although no doubt he is subject to certain statutory obligations; but it would be a startling decision if the Court were to hold (as it never has held yet) that he is so far a trustee as to be liable to each of the creditors and contributories of the company for delay or dilatory conduct in collecting the assets of the company and distributing the surplus. The *dicta* relied on by the Plaintiff in support of this contention do not go that length. The expression "trust property" means only that by the winding-up the property had ceased to be at the disposal of the company, as is clearly shown by the judgment of *Mellish*, L.J. (5); and again, the statement that the liquidator holds property in trust, or is a statutory trustee, as in *Black & Co.'s Case* (6), cannot mean more than that he is entrusted by statute with certain powers which formerly belonged to the directors, with certain statutory obligations. And *In re London and Caledonian Marine Insurance Company* (7), is really an authority in the Defendant's favour; for the observations of *James*, L.J., which are relied on, are confined to the cases of fraud, *mala fides*, and dishonesty.

(1) 1 Ch. D. 130, 133.
(2) 9th Ed. p. 376.
(3) 12 Mod. 472, 488; 1 Ld. Raym. 646.
(4) Law Rep. 4 Q. B. 462.
(5) Ibid. 9 Ch. 560.
(6) Ibid. 8 Ch. 254.
(7) 11 Ch. D. 140.

[ROMER, J.:—The Lord Justice says, "knowingly and wilfully"—in other words, *malâ fide*.]

The Plaintiff could have proceeded by summons under sect. 138 of the *Companies Act*, and have asked thereby for an allotment of shares.

On the question of damages, all that *Williams* v. *Peel River Land and Mineral Company* (1) decides, is that the maximum of damages to be allowed under proper circumstances would be the difference in price between the shares at the two dates, but not that that amount must be always given, and the sums of cash on which interest is asked do not come within the statute.

Haldane, in reply.

ROMER, J.:—

In my judgment this action fails. It is an action brought against the liquidator of a company which was being wound up voluntarily for damages arising from delay in delivering up to the Plaintiff, as a shareholder, his proportion of cash and shares forming part of the company's assets, this delay being attributed to the negligence of the liquidator.

It is admitted that there is no *mala fides* on the part of the liquidator; that it is not a case of dishonesty or fraud, or of the liquidator knowingly and wilfully, in other words *malâ fide*, declining to give to the Plaintiff his proportion of the assets. At most it is only a case of a liquidator making an honest mistake in judgment. That being so, I need not consider the exact circumstances of the case on which the Defendant relies, as shewing that in fact he was justified in what he did, and had been guilty of no negligence. For, in my opinion, even assuming the Plaintiff's case as I have stated it to be correct, such an action as this cannot be maintained against the liquidator. The action is certainly novel; it is admitted that there is no precedent for it. The ground on which it is based is, that at law the Defendant is a trustee for the Plaintiff of his proportion of the assets in the liquidator's hands, and that the liquidator is liable in his capacity of trustee for negligence. In my judgment the liquidator is not a trustee in the strict sense, with such a liability

(1) 55 L. T. (N.S.) 689.

ROMER, J. affecting his position as has been contended for by the Plaintiff. The consequences would be very serious if such a doctrine were to be upheld. If a liquidator were held to be a trustee for each creditor or contributory of the company, his liability would indeed be onerous, and would render the position of a liquidator one which few persons would care to occupy.

1891

KNOWLES v. SCOTT.

In support of the Plaintiff's contention reference has been made to the *dicta* of distinguished Judges in various cases, which describe a liquidator as a trustee—or as holding assets of his company in trust. No doubt in a sense and for certain purposes a liquidator may fairly enough be described as a trustee; but he is not in my judgment, in the strict sense in which the Plaintiff must use the term to enable him to succeed in this action, a trustee. A director is not a trustee for the shareholders of the company, though he is often referred to in various cases as a trustee, and no doubt rightly enough for certain purposes. The cases to which the Plaintiff referred were *In re Oriental Inland Steam Company* (1); *Black & Co.'s Case* (2), and *In re London and Caledonian Marine Insurance Company* (3). In the first case *James*, L.J., used the expression "trust property"; but that was with reference to the case then before the Court; and in my opinion the Judge who used that phrase was using it in order to point out that the property of the company had ceased to belong beneficially to the company after it had been wound up. There is also the phrase in that case as to the liquidator holding the assets fixed by the Act of Parliament with a trust for equal distribution amongst the creditors, and that the 95th section of the Act of 1862 constitutes "a trust for the benefit of all the creditors." That again is used there in a general sense, and no doubt correctly, as shewing that the liquidator held the assets with certain obligations resting on him; but those expressions were obviously not intended to apply to a case like this, and the learned Judges were not in my opinion intending to describe the liquidator of a company as a trustee for each creditor or contributory of the company.

In *Black & Co.'s* case the expression used is that the liquidator is "a statutory trustee." That phrase again was, I

(1) Law Rep. 9 Ch. 557. (2) Law Rep. 8 Ch. 254.
(3) 11 Ch. D. 140.

think, used not in the sense in which the Plaintiff seeks to use it here, but with reference to a question concerning the powers of a company and of its directors as distinguished from the powers of a liquidator, and I take it as pointing out what the duty of the liquidator was. In *In re London and Caledonian Marine Insurance Company* (1), *James*, L.J., in pointing out that possibly a creditor who had not been paid his debt might have his remedy against the liquidator personally, confined his observations to a case where the liquidator had acted "knowingly and wilfully," or to a case where he had been guilty of bad faith or gross or personal misconduct.

In my view a voluntary liquidator is more rightly described as the agent of the company—an agent who has, no doubt, cast upon him by statute and otherwise special duties, amongst which may be mentioned the duty of applying the company's assets in paying creditors and distributing the surplus among the shareholders. Lord Justice *James* referred to this as being his true position in the case of *In re Anglo-Moravian Hungarian Junction Railway Company* (2). If this be the true position of a liquidator, and I think at any rate agency more nearly defines his true position than trusteeship, it is clear that he could not as agent be sued by a third party for negligence apart from misfeasance or personal misconduct.

It is said that, if this be so, the Plaintiff had no remedy. That is not the case—he certainly could have applied to the Court under sect. 138 of the *Companies Act*, 1862. All I hold is, that the liquidator is not liable to an action for damages for delay in performing his duty when that delay was not wilful or fraudulent and in no way arose from *mala fides* on his part.

The action fails, and must be dismissed with costs.

Solicitors for Plaintiff: *W. & J. Flower & Nussey*, agents for *Berry, Robinson & Scott, Bradford.*

Solicitors for Defendant: *Chinery, Aldridge & Co.*, agents for *T. & H. Greenwood Teale, Leeds.*

(1) 11 Ch. D. 140.

(2) 1 Ch. D. 130, 133.

A. C. E.

END OF VOL. I.

The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 1, 1891, will be as follows :—

In the First Series,
[1891] 1 Ch. [1891] 2 Ch. [1891] 3 Ch.

In the Second Series,
[1891] 1 Q. B. [1891] 2 Q. B. [1891] P.

In the Third Series,
[1891] A. C.

INDEX.

ACKNOWLEDGMENT — Married woman — Disentailing deed - - - 524
See TENANT IN TAIL.

ACTION—Leave to continue — Winding-up of company - - - - 187
See COMPANY. 10.

ADMISSION—Misconduct of arbitrator - 558
See EVIDENCE. 2.

AFFIDAVIT—Description of deponent - 657
See PRACTICE. 1.

AFTER-ACQUIRED PROPERTY — Bankrupt - - - - - 695
See BANKRUPTCY. 2.

AGREEMENT — Validity — Restraint of trade - - - - 576
See RESTRAINT OF TRADE.

AMENDMENT — Pleadings — Statute of Frauds - - - - 384
See FRAUDS, STATUTE OF.

ANNUITY—*Life Annuity charged on Land — Trustees empowered to sell Land and purchase Government Annuity—Right to receive Value of Annuity—Death of Annuitant before Completion of Sale by Trustees.*] A testatrix by her will bequeathed life annuities charged on land and, subject to the annuities, devised the land to trustees on trust for sale. By a codicil she empowered the trustees to purchase Government annuities for the annuitants, such Government annuities, if purchased, to be in place of the annuities given to them respectively, and directed that the purchase-money should be a first charge on the proceeds of sale of the land, and that upon purchase of the Government annuities the land should be discharged. The trustees proceeded to sell the land; the sale was completed and, pursuant to the conditions of sale, a sufficient sum of money was deposited in a bank for the purchase of the Government annuities, but such annuities were not actually purchased. One of the annuitants died after the contract of sale was entered into, but before completion or payment of the purchase-money. Another annuitant had subsequently died :—*Held*, that the legal personal representative of the annuitant who died before completion was not entitled to receive from the trustees the value of her annuity; but that the

ANNUITY—*continued.*
legal personal representative of the other annuitant was so entitled, *In re* MABBETT. PITMAN *v.* HOLBORROW - - - - - 707

ARBITRATION—Misconduct of arbitrator—Evidence - - - - 558
See EVIDENCE. 2.

ARRANGEMENT WITH CREDITORS—Scheme of—Sanction of Court—Company 213
See COMPANY. 7.

ASSIGNMENT—Complete or incomplete—Voluntary settlement - - - 82
See VOLUNTARY SETTLEMENT.

AWARD—Motion to set aside—Evidence 558
See EVIDENCE. 2.

BANKER — *Deposit of Securities by Broker — Foreign Bonds payable to Bearer — Negotiable Securities—Bonâ fide Holder—Sale by Bankers—Measure of Damages.*] The Plaintiff S. entrusted D., a stockbroker, with bonds of a foreign company payable to bearer. D. sold the bonds without the Plaintiff's authority, and repurchased others of the same kind, which he entered by their proper numbers in his books as the Plaintiff's bonds, and pledged them, together with securities belonging to other customers, with the Defendant bank, to cover an advance to himself. — The Plaintiff L. employed D. to purchase for him shares in a foreign company transferable by delivery of the certificates, shares in an English company transferable in like manner, and bonds of a foreign government payable to bearer. In the case of the shares in the English company D. substituted others of the same kind for those purchased for L., and then deposited the substituted shares in the English company, and also the shares in the foreign company and the bonds of the foreign government, together with securities belonging to other customers, with the Defendant bank to cover an advance to himself. In each case the documents were entered by their proper numbers in D.'s books as belonging to L. — D. became insolvent, and the Defendants sold the securities deposited with them in discharge of his debt to them.—S. and L. brought actions

BANKER—*continued.*
against the Defendants, claiming a return of their securities or payment of their value. It was admitted that all the above-mentioned bonds and shares were transferable by delivery, and passed from hand to hand on the London Stock Exchange:—*Held* (1), that an authority to a broker to pledge a customer's securities does not (in the absence of an express power to that effect) authorize the broker to pledge them *en bloc* with those of other persons to raise a lump sum;—(2.) That the true inference from the course of dealing between the Defendant bank and D. and the other facts of this case was, that the Defendants were aware that the bonds and shares deposited might probably not belong to D., but to one or more of his customers, and took for granted that he was authorized to pledge them; but that they did not believe D. was authorized by his customers to pledge their securities *en bloc* together with other securities belonging to other persons to raise a lump sum on the whole;—(3.) That, assuming that the bonds and shares were negotiable securities in the legal sense of the term, the Defendants were not, under these circumstances, *bonâ fide* holders of them without notice;—(4.) That the bonds and shares which had been purchased by D. to replace those of the Plaintiffs were substituted for the original bonds and shares, and became the property of the Plaintiffs before the deposit with the bank;—(5.) *Held*, also, that the measure of the Defendants' liability was the price of the securities realized, with 4 per cent. interest from the date of realization.—But, *quære*, whether the above-mentioned bonds and shares were negotiable securities in the proper sense of the term.—"Negotiable securities" defined.—The judgment of Kekewich, J., affirmed. SIMMONS *v.* LONDON JOINT STOCK BANK. LITTLE *v.* LONDON JOINT STOCK BANK - - - **C. A. 270**

BANKRUPTCY—*Future Liability—Debt provable—Covenant by Bankrupt before his Bankruptcy that his Representatives should pay Money Six Months after his Death—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 37.] The term "liability" in the 37th section of the Bankruptcy Act, 1883, includes a liability under a covenant for the payment of money out of the estate of the covenantor after his death, and the value of such a liability is provable as a debt in the bankruptcy of the covenantor.—By deed, dated in June, 1885, A. covenanted with B. that his executors or administrators should, within six months after his death, pay to B. a sum of money, with interest from his death.—In 1886 A. became bankrupt, and effected an arrangement with his creditors under the Bankruptcy Act, 1883.—After A.'s death, B., who knew of the bankruptcy, but had not proved or made any claim in the bankruptcy proceedings, brought an action against A.'s executors upon the covenant contained in the deed of June, 1885.—*Held* by the Court of Appeal (affirming the judgment of Stirling, J.), that A.'s liability or obligation under the covenant constituted a debt provable in his bankruptcy, and that B.'s right of action on the covenant had been barred by the bankruptcy, and his action must be dismissed. BARNETT *v.* KING - - - - - **C. A. 4**

BANKRUPTCY—*continued.*
2. —— *Scheme of Arrangement—"Commencement" of Scheme—Approval of Court—Debtor—"Property of the Bankrupt"—After-acquired Property—Subsequent Assignment of Debtor—Title of Trustee—Order of Discharge—Bankruptcy Act*, 1883, *s.* 18, *sub-ss.* 12, 13, *s.* 44 (i.).] A scheme of arrangement under sect. 18 of the Bankruptcy Act, 1883, whereby all the debtor's property is vested in a trustee for payment of the debts by instalments, passes only such property as the debtor is entitled to at the "commencement" of the scheme—that is, at the date of its sanction by the creditors (reading sect. 18, sub-sect. 13, and sect. 44 (i.) together)—and up to the date of its approval by the Court, and does not, unless the scheme contains an express stipulation to that effect, include any after-acquired property of the debtor, such as a legacy bequeathed by the will of a testator dying subsequently to the date of the approval of the scheme by the Court, even though the debtor has not obtained a formal order of discharge; the approval of the scheme by the Court being equivalent to an order of discharge.—*Ex parte Clark* (13 Q. B. D. 426) discussed. *In re* CROOM. ENGLAND *v.* PROVINCIAL ASSETS COMPANY - - **695**

BASE FEE—Disentailing deed—Acknowledgment by married woman - - **524**
See TENANT IN TAIL.

BENEFICE—Sequestration—Appointment of parish clerk - - - **144**
See PARISH CLERK.

BILL OF COSTS—Remuneration Act—Scale fee
See SOLICITOR. 1, 2. **[105, 248**

BILL OF SALE—*Address of Attesting Witness—Names of Parties—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 8, 9, *and Schedule.*] The execution of a bill of sale was attested by "W. G. C., clerk to the D. Bank, 6, D. Street, Charing Cross." From the affidavit filed with the bill of sale it appeared that W. G. C., though employed at the D. Bank, resided elsewhere:—*Held*, by North, J., that the bill of sale was void, because the attestation did not state the residence of the attesting witness:—*Held*, on appeal, that the address given was sufficient, and that the bill of sale could not be avoided on that ground.—The grantee in a bill of sale was described as "the D. Bank, of 6, D. Street, Charing Cross (of which said bank L. S. of the same place is the sole proprietor)," and throughout the instrument the D. Bank was treated as the grantee, the name of L. S. not being again mentioned:—*Held*, that the bill of sale was void as not being according to the form in the Act, for that one thing characteristic of the statutory form was that the name of the grantee should be given, that the name, therefore, ought to be given without ambiguity, and that in the present case there was no irresistible inference on the face of the bill of sale that L. S. was trading under the name of the D. Bank, and was the grantee. *In re* HESELTINE. WOODWARD *v.* HESELTINE **[C. A. 464**

2. —— *Debentures of Incorporated Company — Winding-up — Non-registration — Debenture-holders—Execution Creditors—Priority—Bills of*

BILL OF SALE—*continued.*

Sale Acts, 1854 (17 & 18 *Vict. c.* 36), 1878 (41 & 42 *Vict. c.* 31), *and* 1882 (45 & 46 *Vict. c.* 43), *s.* 17.] Debentures of a joint stock company, limited, creating a charge on the floating real and personal property of the company, are expressly excepted from the operation of the Bills of Sale Act, 1882, by sect. 17 of that Act.—The words "or other incorporated company" in that section are not to be construed as limited to companies *ejusdem generis* with mortgage or loan companies; but, even if so construed, any incorporated company which is authorized to raise money on loan or mortgage would, for the purposes of sect. 17, be *ejusdem generis* with "a mortgage or loan company."—*Jenkinson* v. *Brandley Mining Company* (19 Q. B. D. 568) dissented from.—The mortgages or charges of any incorporated company for the registration of which statutory provision has already been made by the Companies Clauses Act, 1845, or the Companies Act, 1862, are not, upon the true construction of the Bills of Sale Act, 1878, bills of sale within the scope of that Act.—The decision of the Vice-Chancellor of the County Palatine Court of Lancaster reversed. *In re* STANDARD MANUFACTURING COMPANY - - - - - C. A. 627

BOARD OF AGRICULTURE—Consent of—Application of purchase-money under Lands Clauses Act - - - - 333
See UNIVERSITY. 1.

BONDS—Payable to bearer—Negotiable securities—Deposit with banker - 270
See BANKER.

BORROWING POWER — Company — Loan by bankers - - - - 173
See COMPANY. 2.

BREACH OF TRUST—Insufficient security—Solicitor—Negligence - - - 337
See SOLICITOR. 4.

BROKER—Deposit of customer's securities with bank - - - - - 270
See BANKER.

—— Shipbroker—Managing owner—Secret profit
See SHIP. [390

BUILDING LINE—Street—Front main wall 194
See LOCAL GOVERNMENT ACTS. 1.

CAPITAL—Company—Income — Ordinary and preference shareholders - - 155
See COMPANY. 14.

—— Company—Increase of - - - 66
See COMPANY. 4.

—— Company—Mortgage of uncalled capital
See COMPANY. 2. [173

—— Company—Reduction of - - 396
See COMPANY. 5.

CASES — *American Pastoral Company, In re* (W. N. (1890) p. 62) followed - 396
See COMPANY. 5.

—— *Barrow Hæmatite Steel Company, In re* (39 Ch. D. 582) followed - - 396
See COMPANY. 5.

—— *Bartlett* v. *Pickersgill* (4 East, 577, n.; S.C. 1 Eden, 515) followed - - 384
See FRAUDS, STATUTE OF.

CASES—*continued.*

—— *Black & Co.'s Case* (Law Rep. 9 Ch. 557) dictum explained - - - 617
See COMPANY. 15.

—— *Blair* v. *Bromley* (2 Ph. 354) considered 547
See PARTNERSHIP.

—— *Clark, Ex parte* (13 Q. B. D. 426), discussed - - - - 695
See BANKRUPTCY. 2.

—— *Clark* v. *Taylor* (1 Drew. 642) followed 373
See CHARITY. 1.

—— *Cowen* v. *Phillips* (33 Beav. 18) followed 51
See METROPOLITAN BUILDING ACT.

—— *Cox's Case* (4 D. J. & S. 53) distinguished
See COMPANY. 8. [202

—— *Doe* v. *Biggs* (2 Taunt. 109) doubted 258
See TRUSTEE. 3.

—— *Earl* v. *Stocker* (2 Vern. 251) considered 558
See EVIDENCE. 2.

—— *Empire Mining Company, In re* (44 Ch. D. 402), approved - - - 213
See COMPANY. 7.

—— *Evans* v. *Prothero* (1 D. M. & G. 572) distinguished - - - - 568
See EVIDENCE. 1.

—— *Gatling Gun, In re* (43 Ch. D. 628), followed
See COMPANY. 5. [396

—— *Glanvill, In re* (31 Ch. D. 532), distinguished - - - - 617
See HUSBAND AND WIFE.

—— *Green* v. *Davies* (4 B. & C. 235) followed
See EVIDENCE. 1. [568

—— *Harpham* v. *Shacklock* (19 Ch. D. 207) explained - - - - - 8
See MORTGAGE.

—— *Hayter* v. *Trego* (5 Russ. 113) explained 373
See CHARITY. 1.

—— *Heard* v. *Pilley* (Law Rep. 4 Ch. 548) commented on - - - - 384
See FRAUDS, STATUTE OF.

—— *Henry Pound, Son, & Hutchins, In re* (42 Ch. D. 402), discussed - - - 475
See COMPANY. 11.

—— *Hunt* v. *Harris* (19 C. B. (N.S.) 13) explained - - - - 51
See METROPOLITAN BUILDING ACT.

—— *Jenkinson* v. *Brandley Mining Company* (19 Q. B. D. 568) dissented from - 627
See BILL OF SALE. 2.

—— *London and Caledonian Marine Insurance Company, In re* (11 Ch. D. 140), dictum explained - - - - 717
See COMPANY. 15.

—— *Mackenzie's Trusts, In re* (23 Ch. D. 750), approved - - - - 399
See SETTLED LAND ACT. 1.

—— *Maude, Ex parte* (Law Rep. 6 Ch. 51), followed - - - - 66
See COMPANY. 4.

—— *Mills* v. *Society of Bowyers* (3 K. & J. 66) considered - - - - 558
See EVIDENCE. 2.

—— *Morgan* v. *Mather* (2 Ves. 15) considered
See EVIDENCE. 2. [558

CASES—*continued.*

—— *Onslow* v. *Wallis* (1 Mac. & G. 506) distinguished - - - - **258**
See TRUSTEE. 3.

—— *Orde, In re* (24 Ch. D. 271), distinguished
See PRACTICE. 1. **[657**

—— *Oriental Inland Stream Company, In re* (Law Rep. 8 Ch. 254), dictum explained **717**
See COMPANY. 15.

—— *Orr-Ewing* v. *Registrar of Trade-marks* (4 App. Cas. 479) explained - **41**
See TRADE-MARK.

—— *Palmer's Trade-mark, In re* (24 Ch. D. 504), followed - - - - **41**
See TRADE-MARK.

—— *Peek* v. *Trinsmaran Iron Company* (2 Ch. D. 115) followed - - - **133**
See COMPANY. 3.

—— *Pinder* v. *Barr* (4 E. & B. 105) distinguished
See PARISH CLERK. **[144**

—— *Pugh & Sharman's Case* (Law Rep. 13 Eq. 566) distinguished - - - **202**
See COMPANY. 8.

—— *Quebrada Railway, &c., Company, In re* (40 Ch. D. 363) followed - - **396**
See COMPANY. 5.

—— *Rishton* v. *Grissell* (Law Rep. 5 Eq. 326) followed - - - - **140**
See COMPANY. 6.

—— *Smith* v. *Reed* (W. N. (1883) p. 196) followed - - - - **367**
See PRACTICE. 3.

—— *Spargo's Case* (Law Rep. 8 Ch. 407) distinguished - - - - **119**
See COMPANY. 9.

—— *Tennant, In re* (40 Ch. D. 594), approved **399**
See SETTLED LAND ACT. 1.

—— *Union Plate Glass Company, In re* (42 Ch. D. 513), not followed - - - **396**
See COMPANY. 5.

—— *Wynstanley* v. *Lee* (2 Sw. 333) considered
See LIGHT. **[658**

CHANCERY DIVISION—Trial by jury - **484**
See PRACTICE. 7.

CHANCERY FUNDS RULES, 1874, r. 34 - **151**
See TRUSTEE RELIEF ACT.

CHARITY—*Charitable Gift—Cy-près.*] A testator by his will gave a number of legacies to various persons, using the introductory words, "I bequeath the pecuniary legacies following." He then gave a number of legacies to various institutions, churches, and bodies, using the introductory words, "I bequeath the following charitable legacies"; and amongst such last-mentioned legacies was one to an orphanage voluntarily maintained by a lady at her own expense, which was in existence at the time of the testator's death, but was discontinued shortly afterwards, and before his assets were administered:—*Held*, (1st) that as the legacy was to a private institution, maintained at the expense of an individual, the Court could not, on the failure of the particular charity, apply the legacy *cy-près*:—*Held*, (2ndly) that the introductory words were made use of merely as a convenient mode of grouping together the various institutions which the testator meant to benefit, and that no general charitable intention could be inferred from them; and—*Held*, accordingly, that the legacy fell into the residue of the testator's estate.—*Clark* v. *Taylor* (1 Drew. 642) followed. —*Hayter* v. *Trego* (5 Russ. 113) explained. *In re* SLEVIN. SLEVIN *v.* HEPBURN - - **373**

2. —— *Charitable Gift — Mortmain—Waterworks Mortgage—Pure or impure Personalty.*] The corporation of Preston, as the local board of health, in exercise of their powers under the Preston Waterworks Act, 1853, the Local Government Supplemental Act, 1861, and the Preston Improvement Act, 1869, and in consideration of £150, mortgaged to the testatrix, "her executors, administrators, and assigns, such proportion of the rents, rates, and waterworks which by the said acts" were authorized, as the principal sum bore to the whole sum borrowed, to hold until the principal sum and interest should be paid and satisfied:—*Held*, that such mortgage was in substance a mortgage of the general undertaking, and did not confer upon the testatrix an interest in land within the Mortmain Acts; and consequently that the mortgage debt was pure personalty and passed under a bequest in her will for charitable purposes.—The authorities considered. *In re* PARKER. WIGNALL *v.* PARK **682**

CLERGYMAN—Sequestration of benefice—Rights of incumbent - - - **144**
See PARISH CLERK.

COLLEGE - - - - **333, 677**
See UNIVERSITY. 1, 2.

COMPANY—*Alteration of Memorandum—Objects —Main Purpose—Dissentient Minority—Duty of the Court — The Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62), *s.* 1, *sub-ss.* 2, 4, 5, (*a*), (*b*).] The Companies (Memorandum of Association) Act, 1890, does not enable a company in general terms to alter its memorandum of association, neither does it confer a general power upon the Court to do so; but the alterations to be sanctioned are confined to those specified in sect. 1, sub-sect. 5.—Where the "main purpose" of a company was the investment in Government securities, an alteration in the memorandum, giving a power to invest in securities not guaranteed by Government, was refused at the instance of a minority of debenture-stock holders.—Though there are no outside creditors, and though the large majority of the shareholders and debenture-stock holders are in favour of the proposed alteration, the Court will not necessarily confirm the special resolution, even though within the objects specified in sect. 1, sub-sect. 5, until it has carefully considered the interests of those shareholders and debenture-stock holders who do not appear to oppose the petition, and who have presumably left the question to the careful consideration of the Court.—Observations on the Act. Principles on which the Court should proceed in considering these applications, stated. *In re* GOVERNMENTS STOCK INVESTMENT COMPANY **[649**

2. —— *Borrowing Powers—Loan by Bankers —Security by Promissory Notes—Credit by Railway Companies — Guarantees — Agreement—Indemnity Mortgage of uncalled Capital—Creditors.*]

COMPANY—*continued.*

The memorandum and articles of association of a company empowered the directors to borrow on the uncalled capital of the company and exercise all the powers of the company, and provided that every director and other officers should be indemnified by the company from all losses incurred in the discharge of their duties. In 1882 the company being in want of money obtained permission from their bankers to overdraw the account on security being given and promissory notes being signed by two directors. That was done, it being verbally agreed that the two directors should be indemnified by a charge on the uncalled capital, and the board of directors passed a resolution that the directors who had made themselves liable should be indemnified. The notes were from time to time renewed down to February, 1889. The same two directors in May, 1886, gave guarantees to two railway companies in consideration of their giving credit for the goods carried for the company. The board of directors in April, 1886, passed a resolution that the two directors who executed guarantees to the bank, and the railway companies should be indemnified, and that a charge on the uncalled capital of the company should be given in respect of the loan of £5000 by the bank, and that a similar charge should be given in respect of the railway accounts for £1500. A mortgage dated the 3rd of May, 1886, upon the uncalled capital, was given in pursuance of that resolution. The company was in liquidation, and the mortgagees claimed to be paid what was secured to them:—*Held*, that the transaction of the overdraft at the bank was in substance a borrowing of money on the security of uncalled capital within the meaning of the article, though, *semble*, the obtaining the guarantee to the railway companies was not:—*Held*, also, that the articles empowered the directors to issue securities founded on uncalled capital for any legitimate business purpose of the company; that the indemnifying of directors was under the articles such a purpose; that the mortgage was valid as to both liabilities, and that the claim of the mortgagees ought to be admitted by the liquidator. *In re* PYLE WORKS (No. 2) **173**

3. —— *Debenture-holder, Action by—Receiver and Manager—Motion—Realization of Assets—Jurisdiction—Form of Order.*] By the articles of association of a limited company the management of the business and the control of the company were vested in the directors. Under a power in the memorandum of association the company issued debentures purporting to charge all the company's property both present and future, including its uncalled capital.—Upon a motion by the Plaintiff, who was the only debenture-holder, in an action by him against the company to enforce his securities.—Kay, J., following *Peek* v. *Trinsmaran Iron Company* (2 Ch. D. 115), but with great hesitation, appointed the managing director of the company receiver of its property and also manager of its business pending realization, with a view to enabling the company's business to be sold as a going concern; the Plaintiff undertaking to provide a sum for wages and current expenses, and also to be answerable for the receipts of the receiver and manager pending his giving security, and to procure the realization of the property as soon as possible. MAKINS *v.* PERCY IBOTSON & SONS **133**

3A. —— *Mortgagee, Action by—Receiver and Manager.*] In an action by a mortgagee of freehold and leasehold collieries worked by a company, the Court appointed a receiver and manager of the collieries, although the "business" was not in terms included in the mortgage. CAMPBELL *v.* LLOYD'S, BARNETT'S, & BOSANQUET'S BANK **[136, n.**

4. —— *Increase of Capital—Shares Issued at a Discount—Ultrà Vires—Winding-up—Surplus Assets—Distribution—Rights of Original and Discount Shareholders—Contract.*] A company was incorporated in 1887, with limited liability, by registration under the Joint Stock Companies Act, 1856. The capital was divided into £10 shares, and the shares issued were paid up in full in cash. In 1861 the company was in difficulties, and the market value of the shares was only £3 per share. The company resolved to increase their capital, and special resolutions were passed (after notice sent by post to every shareholder in accordance with the company's regulations) to increase the capital by the creation of additional £10 shares, which, as well as the unissued original shares, where to be issued at a discount of £7 per share. In pursuance of these resolutions, notices offering the new shares for subscription were sent to all the existing shareholders, and thereupon a number of shares were applied for and issued as fully paid up, on payment by the allottees of only £3 per share. The shares thus issued were treated for upwards of twenty years, as to payment of dividend and otherwise, in every respect on the same footing as the original shares. In 1889 the company resolved on a voluntary winding-up. The creditors were all satisfied, and there remained a surplus of £25,000 for division among the shareholders. The liquidator applied to the Court to determine the mode in which the fund ought to be divided:—*Held*, by North, J., that though the issue of shares at a discount was illegal as being *ultrà vires*, the holders of the shares so issued could not under the circumstances repudiate their shares, but that they must be treated as shareholders having paid only £3 per share:—Also, on the authority of *Ex parte Maude* (Law Rep. 6 Ch. 51), that out of the surplus (after payment of costs) the sum of £7 per share must first be paid to the original shareholders, and that the residue of the fund must then be divided rateably among all the shareholders:—*Held*, on appeal, that the contract entered into by the holders of the discount shares was a contract as between themselves and the company alone and *ultrà vires*; and that as between those shareholders and the old there was no contract, either express or implied, that in the event of the company's debts being satisfied and there being surplus assets, the new shareholders should be entitled to any priority or advantage in the distribution of those assets.—North, J., affirmed. *In re* WEYMOUTH AND CHANNEL ISLANDS STEAM PACKET COMPANY - - - **C. A. 66**

5. —— *Reduction of Capital—Partial Reduction—Ultrà Vires—Original Capital—Preference*

COMPANY—*continued.*

Capital—Companies Acts, 1867 *and* 1877.] The Court may sanction a resolution passed by a limited company for the reduction of the whole of its original capital apart from any reduction of its preference capital.—*In re Barrow Hæmatite Steel Company* (39 Ch. D. 582), *In re Quebrada Railway, Land and Copper Company* (40 Ch. D. 363), *In re Gatling Gun, Limited* (43 Ch. D. 628), and *In re American Pastoral Company* (W.N. (1890) p. 62), followed.—*In re Union Plate Glass Company* (42 Ch. D. 513) not followed.—*Quære,* whether the Court will sanction a reduction of part only of one class of capital. *In re* Agricultural Hotel Company - - 396

6. —— *Remuneration of Directors — "Net Profits" — Percentage Sale of the Undertaking and Assets—Winding-up.*] Articles of association provided that the directors should be paid in each year as remuneration for their services a sum equal to 3 per cent. on the "net profits" of the company of such year. The company resolved on a voluntary winding-up, for the purpose of selling its undertaking and assets to a new company. A very large profit was made by this sale. On an action by one of the directors for his proportion of the 3 per cent. on the profits so made:—*Held,* that "net profits" in the article in question was intended to apply to profits made by the company as a going concern, and not to profits made by a sale of the whole undertaking and assets in a winding-up; that the directors' remuneration was intended to be a return for their services, to which the present sale was not attributable, and that accordingly the Plaintiff's claim failed.—*Rishton* v. *Grissell* (Law Rep. 5 Eq. 326) approved. Frames *v.* Bultfontein Mining Company - - - - - 140

7. —— *Winding-up—Arrangement with Creditors—Sanction of Court—Jurisdiction—Debenture-holders—Scheme depriving Creditors of their Security — Joint Stock Companies Arrangement Act,* 1870 (33 & 34 *Vict. c.* 104), *s.* 2.] The power given by the Joint Stock Companies Arrangement Act, 1870, sect. 2, to sanction a scheme of arrangement between a company in liquidation and its creditors extends to debenture-holders and other secured creditors, and enables the Court to sanction a scheme, although it deprives debenture-holders of their security wholly or in part.—*In re Empire Mining Company* (44 Ch. D. 402) approved.—In exercising the power of sanctioning a scheme of arrangement conferred on it by the Act, the Court will not only ascertain that all the statutory conditions have been complied with, but will also consider whether the class of creditors summoned to the meeting was fairly represented by those who attended, and whether the statutory majority who approved of the scheme were acting *bonâ fide* or were seeking to promote interests adverse to those of the class whom they professed to represent, and generally whether the arrangement is such as a man of business would reasonably approve.—The decision of North, J., affirmed. *In re* Alabama, New Orleans, Texas and Pacific Junction Railway Company [C. A. 213

8. —— *Winding-up—Contributory—Director —Shares—Letter of Application—Nominee—Fictitious Name—Fraud—Principal—Agent—Contract—"Member of Company"—Companies Act,* 1862, *s.* 23.] C. sent to the directors of a company a letter of application, signed by him "for" his son, naming him, for the allotment of 200 shares. C. was himself one of the directors, and the application was made under an arrangement between the directors that, in order to make it appear that the whole of the share capital had been issued, the shares remaining unallotted should be issued to their nominees temporarily until applied for by the public, there being no intention that either the directors or their nominees should be under any liability in respect of such shares. Accordingly the son was registered as the holder of the 200 shares. The son, who was residing abroad, was totally unaware of the application or of the registration of the shares in his name. Nothing was ever paid on the shares, either by way of deposit, dividend, or otherwise, and no certificate of allotment was ever issued, Subsequently the company passed a resolution for a voluntary winding-up, and, both C. and his son having died, the son never having in any way recognized his position as shareholder, the liquidator placed C.'s executors upon the list of contributories in respect of the shares.—Upon a summons by the executors to have their names removed from the list:—*Held,* by the Court of Appeal, that the case was governed by the ordinary law of contract; and that, although C. and his co-directors might have rendered themselves jointly and severally liable on the ground of fraud, yet the facts did not establish such an actual contract by C. to take the shares as to justify his executors being placed on the list of contributories in respect of it.—Decision of Kay, J., reversed.—*Pugh and Sharman's Case* (Law Rep. 13 Eq. 566), and *Cox's Case* (4 D. J. & S. 53), distinguished. *In re* Britannia Fire Association. Coventry's Case C. A. 202

9. —— *Winding-up—Contributory — Paid-up Shares—Payment—Companies Act,* 1867 (30 & 31 *Vict. c.* 131), *s.* 25.] In order that a transaction between a company and an allottee of shares may amount to a "payment in cash" of the amount payable on the shares within sect. 25 of the Companies Act, 1867, each party must have an actual demand on the other for present payment.—If a creditor of the company agrees to accept payment of his debt in fully paid-up shares, and shares purporting to be fully paid up are allotted to him, which he accepts, and after an order for winding up the company it is discovered that the shares are not fully paid up, the shares cannot be treated as having been fully paid up, on the principle of *Spargo's Case* (Law Rep. 8 Ch. 407), since a contract to take fully paid-up shares does not create a liability to pay money, and there are, therefore, no cross-debts between the company and the allottee. *In re* Johannesburg Hotel Company. *Ex parte* Zoutpansberg Prospecting Company [C. A. 119

10. —— *Winding-up — Debenture-holder's Action—Practice—Receiver—Official Liquidator —Leave to continue Action—Displacing Receiver by Liquidator—Companies Act,* 1862, *s.* 87.] It is the uniform practice of the Court, founded on convenience, in ordinary cases where a company

COMPANY—*continued.*

has been ordered to be wound up, to appoint one officer to represent both the company and the secured creditors, such as debenture-holders or mortgagees; but that practice is not to be extended by appointing the official liquidator in the winding-up to be receiver in the place of a receiver appointed by the Court, before the date of the winding-up order, in a debenture-holder's action where the debentures purport to charge substantially the whole of the company's property, both present and future, including the uncalled capital for the time being.—Where, while a debenture-holder's action against a company is pending, an order is made for winding up the company, the Plaintiff is entitled to leave, under sect. 87 of the Companies Act, 1862, to continue his action, unless the official liquidator is able and willing to give him all he is entitled to in the action without its continuance. *In re* Joshua Stubbs, Limited. Barney *v.* Joshua Stubbs, Limited - - - - - **187**

11. —— *Winding-up—Debenture-holder's Action—Practice—Receiver — Official Liquidator—Receiver and Manager—Displacing Receiver by Liquidator—Discretion of Court.*] As a general rule of convenience, where, upon a company having been ordered to be wound up, the Plaintiff in a debenture-holders' or mortgagees' action applies to the Court for the appointment of a receiver, and an application is also made in the winding-up for the appointment of a liquidator, the Court will, in the exercise of its discretion, appoint a liquidator to act in both capacities.—Also, where the debenture-holders or mortgagees have, either before or after the winding-up, obtained an order in their action appointing a receiver, and subsequently a liquidator is appointed in the winding-up, the Court will ordinarily in the exercise of its discretion appoint the liquidator in the place of the receiver, to act as receiver as well as liquidator, upon the ground that, under the winding-up machinery provided by the Companies Acts, the liquidator can get in such outstanding assets more expeditiously and with less expense than the receiver; but it will not in general do so where there is no substantial amount of calls and similar assets outstanding.—But where a receiver has been appointed by the debenture-holders or mortgagees themselves under a power given them by their security, the Court will not displace him by the liquidator:—*Semble*, if in the debenture-holders' or mortgagees' action an order has been made appointing a person manager of the company's business as well as receiver, the Court will, in case the business is one that can still be carried on, appoint the liquidator to act as both receiver and manager in his place.—Where a judge of first instance has, in the exercise of his discretion, refused to displace a receiver by a liquidator, the Court of Appeal will not, in the absence of special circumstances to justify their so doing, interfere with that exercise of discretion.—Decision of Kekewich, J. affirmed. *In re Henry Pound, Son, & Hutchins* (42 Ch. D. 402) discussed. *In re* Joshua Stubbs, Limited. Barney *v.* Joshua Stubbs, Limited [C. A. 475

12. —— *Winding-up — Sequestration — Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 87, 163 —*Scotch Urban Landlord's Hypothec.*] On motion by a liquidator in a winding-up to restrain a Scotch landlord of urban property from proceeding with sequestration to enforce his hypothec:—*Held*, that the sequestration was void under sect. 163 of the Companies Act, 1862. But, the Court being of opinion, on the evidence as to Scotch law, that hypothec gives a security on the goods on the premises, leave was given, under sect. 87 of the Companies Act, 1862, to proceed with the sequestration unless sufficient security was given for the rent of the current year, including a period previous to the winding-up, on terms of the landlord paying the costs of the motion. *In re* Wanzer, Limited - - - **305**

13. —— *Winding-up—Staying Actions against Company—Companies Act*, 1862, *s.* 85—*Judicature Act*, 1873, *s.* 24, *sub-s.* 5—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63)—*General Order of the 29th of November*, 1890.] When a petition has been presented in the Chancery Division to wind up a company, an application to stay an action against the Company in the Queen's Bench Division must still be made in the Division in which the action is pending, the practice in this respect not being altered by the Companies (Winding-up) Act, 1890, and the General Order under it. Decision of Kekewich, J., affirmed. *In re* General Service Co-operative Stores [C. A. **496**

14. —— *Winding-up—Surplus Assets—Rights of Contributories inter se—Ordinary and Preference Shareholders—Income and Capital.*] The articles of association of a company which had power to increase its capital provided that the directors might set aside out of profits sums as a reserve for specified purposes and other contingencies in priority to dividends, and, subject to that provision, that the entire profits of each year should belong to the shareholders. Under the power to increase capital, shares with a fixed preferential dividend had been created.—The undertaking of the company was sold by Act of Parliament at a price which left a surplus in excess of the liabilities of the company and the paid up capital.—The sale was completed during the currency of a financial year:—*Held*, that the ordinary shareholders were entitled to the net profits of the current year (subject to paying an apportioned dividend to the preference shareholders), including a balance carried forward from the last year, and a sum reserved for canal improvements, and not so applied;—(2.) That they were not entitled to reserve funds for insurance and depreciation;—(3.) Nor to any inquiry as to the excess of the real value of plant and works over the value stated in the published accounts, or as to any application in the past accounts to capital purposes of sums which might have been divided as profits. *In re* Bridgewater Navigation Company - - - **155**

15. —— *Winding-up—Voluntary Winding-up—Liquidator — Liability of — Trustee — Agent—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 138.] A liquidator is not strictly speaking a trustee either for the creditors or the contributories of a company in liquidation, his position being that of

COMPANY—*continued.*

agent of the company.—Therefore, in the absence of fraud, mala fides, or personal misconduct, an action for damages will not lie against a liquidator at the suit either of a creditor or contributory for delay in paying the creditor's debt, or in handing over to the contributory his proportion of the surplus assets of the company.—Dicta of Selborne, L.C., in *Black & Co.'s Case* (Law Rep. 8 Ch. 254), and of James, L.J., in *In re Oriental Inland Steam Company* (Law Rep. 9 Ch. 557) and *In re London and Caledonian Marine Insurance Company* (11 Ch. D. 140), explained. KNOWLES *v.* SCOTT - - - - 717

—— Debenture—Registration—Bills of Sale Act *See* BILL OF SALE. 2. [627

—— Incorporated by Act of Parliament - 501 *See* TRUSTEE. 2.

—— Winding-up—Shares held in Scotland—Conflict of laws - - - - 536 *See* CONFLICT OF LAWS.

CONDITION—Will—Return to England - 601 *See* WILL.

CONDITIONS OF SALE—Misleading condition 99 *See* VENDOR AND PURCHASER. 1.

—— Right to rescind "notwithstanding previous litigation" - - - - 601 *See* VENDOR AND PURCHASER. 2.

CONFLICT OF LAW—*Company—Unpaid Capital—Debenture—Scotch Judicial Process—Arrestment—Notice—Priorities.*] The U. Bank held debentures issued by the Q. Company, charging the unpaid capital in respect of shares in the Q. Company. The Q. Company were domiciled in Queensland. After such capital had been called but not paid, the A. Company commenced an action in Scotland against the Q. Company, and arrested the calls on the shares in the Q. Company held in Scotland: the holders of such shares had no notice of the debentures.—The Q. Company was ordered to be wound up in Queensland, and also in England. The claim of the A. Company was adjusted in the Queensland winding-up.—It was in evidence that under Scotch law the arrestment was equivalent to an assignment with intimation or notice to the debtor, and took priority over an earlier assignment without intimation. The law of Queensland in respect of the matters in question is the same as that of England:—*Held*, in the English winding-up, that the question of priority on the proceeds of Scotch shares was regulated by the law of Scotland, and that the A. Company had the first charge on such proceeds. *In re* QUEENSLAND MERCANTILE AND AGENCY COMPANY. *Ex parte* AUSTRALASIAN INVESTMENT COMPANY. *Ex parte* UNION BANK OF AUSTRALIA - - - - - 536

CONTRACT—Sale of land—Letters—Subsequent correspondence—Rescission of contract *See* VENDOR AND PURCHASER. 3. [412

—— To take shares—Unauthorized application *See* COMPANY. 8. [202

CONTRIBUTORY - - - 119, 202 *See* COMPANY. 8, 9.

CONVEYANCING—Remuneration of solicitor—Scale fee - - - - 105 *See* SOLICITOR. 1.

COSTS—Apportionment - - - 89 *See* PRACTICE. 2.

—— Lien for—Solicitor and client - 590 *See* SOLICITOR. 3.

—— Married woman—Separate estate—Restraint on anticipation - - - 617 *See* HUSBAND AND WIFE.

—— Security for - - - - 1 *See* PRACTICE. 6.

—— Taxation—Solicitors' Remuneration Act *See* SOLICITOR. 1, 2. [105, 243

COVENANT—Proveable in bankruptcy—Future liability - - - - 4 *See* BANKRUPTCY. 1.

CROWN—Gold mine—Gold mixed with base metals - - - - 432 *See* MINE.

—— Prerogative of—Ancient lights - 658 *See* LIGHT.

CY-PRÈS—Charity—Gift by will - - 373 *See* CHARITY. 1.

DAMAGES—Measure of—Sale of securities deposited with bankers - - 270 *See* BANKER.

DEBENTURE—Registration—Bills of Sale Acts *See* BILL OF SALE. 2. 627

DEBENTURE-HOLDER—Action by—Right to receiver and manager - - 133 *See* COMPANY. 3.

—— Action by—Winding-up—Receiver 187, 475 *See* COMPANY. 10, 11.

—— Scheme of arrangement—Sanction of Court *See* COMPANY. 7. [213

DEBT—Proveable in bankruptcy - - 4 *See* BANKRUPTCY. 1.

DIRECTORS—Remuneration of—Net profits 140 *See* COMPANY. 6.

DISCHARGE OF BANKRUPT—Scheme of arrangement—After-acquired property *See* BANKRUPTCY. 2. [695

DISCLAIMER—Trade-mark - - 41 *See* TRADE-MARK.

DISCOVERY—Security for costs—Increase of deposit - - - - 509 *See* PRACTICE. 4.

—— Security for costs—Several defendants 367 *See* PRACTICE. 3.

EVIDENCE—*Admissibility—Promissory Note insufficiently Stamped—Stamp Act*, 1870 (33 & 34 *Vict. c.* 97), *s.* 54.] A promissory note insufficiently stamped cannot be admitted in evidence to prove the receipt of the money for which the note was given.—*Green* v. *Davies* (4 B. & C. 235) followed.—*Evans* v. *Prothero* (1 D. M. & G. 572) distinguished. ASHLING *v.* BOON - - 568

2. —— *Arbitration—Award—Arbitrator—Misconduct—Setting aside Award—Motion—Oral Evidence—Admission by Arbitrator to one Party—Evidence.*] Evidence of an admission out of Court by an arbitrator, that he made his award improperly—as, for example, by collusion or in consequence of a bribe—is not admissible in sup-

EVIDENCE—*continued.*
port of an application to set aside the award.—*Earl* v. *Stocker* (2 Vern. 251), *Morgan* v. *Mather* (2 Ves. 15), and *Mills* v. *Master, &c., of Society of Bowyers* (3 K. & J. 66), considered. *In re* WHITELEY AND ROBERTS' ARBITRATION - 558

EX PARTE ORDER—Production of documents
See PRACTICE. 5. [323

FRAUD—Misleading conditions of sale - 99
See VENDOR AND PURCHASER. 1.

—— Partner—Liability of co-partners - 547
See PARTNERSHIP.

FRAUDS, STATUTE OF—*Principal and Agent—Employment of Agent by Parol—Denial of Agency—Purchase by and Conveyance to Agent—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 7—*Practice—Pleading Statute—Rules of Supreme Court*, 1883, *Order* XIX., *r.* 15—*Amendment.*] Notwithstanding expressions of disapproval in *Heard* v. *Pilley* (Law Rep. 4 Ch. 548) and elsewhere, the decision of *Bartlett* v. *Pickersgill* (4 East, 577, n.; 1 Eden, 515; 1 Cox, 15; Burr. 2255) is not to be taken as generally overruled, but is still a binding authority in a case where the facts are the same. If, therefore, a principal employs an agent by parol to purchase property, and the agent purchases in his own name, with his own money, and takes a conveyance to himself and denies the agency; to an action by the principal against the agent seeking a conveyance to himself, sect. 7 of the Statute of Frauds still affords a good defence.—The Statute of Frauds must be pleaded if intended to be relied on as a defence; but it is not necessary to plead any particular section. Where, however, the Defendant had pleaded sect. 4, he was not allowed to amend or to avail himself of sect. 7. JAMES *v.* SMITH - 384

FRAUDULENT CONVEYANCE — *Settlement—Fraud on Creditors*—13 *Eliz. c.* 5, *ss.* 1, 5—*Purchaser for Value without Notice—Purchase of Interest derived under Settlement.*] Sect. 5 of 13 Eliz. c. 5, excepting from the operation of that Act (which avoids assurances made in fraud of creditors) interests lawfully conveyed upon good consideration and bonâ fide to persons having no notice of any fraud, includes a purchaser of any interest under the deed impeached, whether that interest be legal or equitable, and prevents the deed being void against him.—By a settlement which was fraudulent against creditors under 13 Eliz. c. 5, a reversionary life interest was reserved to the settlor. He subsequently charged such interest by way of equitable mortgage in favour of a mortgagee who advanced his money without notice that the settlement was fraudulent. In an action by creditors of the settlor to have the settlement declared void:—*Held*, that the interest of the equitable mortgagee was protected by sect. 5, and that the settlement must be declared void as against the Plaintiffs and other creditors of the settlor, except as to his reversionary life interest thereunder. HALIFAX JOINT STOCK BANKING COMPANY *v.* GLEDHILL - 31

GENERAL ORDER UNDER COMPANIES ACT, Nov. 1890 - - - - 496
See COMPANY. 13.

GENERAL ORDER UNDER SOLICITORS' REMUNERATION ACT, 1881, Sched. I., Part I., r. 10 - - - 248
See SOLICITOR. 2.

—— —— **Sched. I., Part I., r. 11** - - 105
See SOLICITOR. 1.

GOLD MINE - - - - - 432
See MINE.

GUARANTEE—Directors of company—Borrowing powers - - - - - 173
See COMPANY. 2.

HUSBAND AND WIFE—*Married Woman—Suit without Next Friend—Restraint on Anticipation—Arrears of Income—Married Women's Property Act*, 1882, *s.* 1, *sub-s.* 2; *s.* 19.] Where costs are ordered to be paid by a married woman, suing under the Married Women's Property Act, 1882, without a next friend, payment of them can be enforced against any separate property to which she is entitled free from restraint on alienation at the time when the order to pay costs is made, and not only against separate property to which she is so entitled at the time when she commences the proceedings.—Where a married woman entitled under a will to income given to her separate use, with a restraint on anticipation, without fixing any days of payment, was ordered to pay to the trustees the costs of certain proceedings taken by her without a next friend:—*Held*, that the trustees ought to be allowed to retain these costs out of a balance of income which was in their hands at the time when the order to pay costs was made, though it was not in hand at the time when she commenced the proceedings, the restraint on anticipation having ceased as to any sums forming part of the income so soon as they came to the hands of the trustees, and that this was not altered by the fact that by an order made in a suit for administering the estate she was prevented from calling for payment of these sums till a later period.—The decision in *In re Glanvill* (31 Ch. D. 532) that only such estate is liable as the married woman is entitled to when she commences the proceedings does not apply where the proceedings are taken under the Married Women's Property Act, 1882, without a next friend.—Decision of Kekewich, J., affirmed. COX *v.* BENNETT. - - - C. A. 617

—— Disentailing deed—Bail—Acknowledgment by wife - - - - 524
See TENANT IN TAIL.

HYPOTHEC—Scotch law—Sequestration—Winding up of English company - 305
See COMPANY. 12.

IMPROVEMENTS—Settled Land Act - 399
See SETTLED LAND ACT. 1.

INCOME—Capital—Company—Ordinary or preference shareholders - - 156
See COMPANY. 14.

INFANT—*Maintenance—Conveyancing Act*, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 43—*Will—Gift to Members of Class for Life contingently on attaining Twenty-one—Income.*] A testator directed his trustees to hold the proceeds of sale of his residuary estate on trust to pay certain life annuities,

INFANT—*continued.*
and subject thereto on trust for such children of his son and two daughters as should attain twenty-one (the shares of his grandchildren born in his lifetime being settled):—*Held*, that the surplus income of the trust fund, after keeping down the annuities, belonged to the grandchildren who had attained twenty-one at the time such income accrued. And that sect. 43 of the Conveyancing Act, 1881, did not apply. *In re* JEFFERY. BURT *v.* ARNOLD - - - - - 671

2. —— *Settlement—Exercise of general Power of Appointment—Failure of Limitations—Resulting Trust—Death of Infant under Twenty-one—Infants Settlement Act*, 1855 (18 & 19 *Vict. c.* 43), *ss.* 1, 2.] Sect. 1 of the Infants Settlement Act enables an infant, in exercising a general power of appointment for the purpose of making a settlement upon his marriage, to make an absolute out-and-out appointment, so that, on the failure of the limitations of the settlement, the appointed property will become his own.—In the event of the death of an infant under twenty-one, after making an appointment under sect. 1, sect. 2 of the Act does not render the appointment void, except in the case of an infant tenant in tail.—A mother, who had an illegitimate daughter, by her will gave the residue of her real and personal estate to trustees, upon trust for conversion, and during the life of the daughter to pay the income thereof to her for her separate use, without power of anticipation; and, from and after her death in trust as she should by will appoint, and in default of appointment in trust for the children of the daughter. After the death of the mother the daughter, who was still an infant, married. Prior to her marriage she, with the sanction of the Court under the Infants Settlement Act, executed a settlement, by which, in exercise of the power given to her by the will, she appointed that her mother's residuary estate should, from and after the solemnization of the intended marriage, become vested in the trustees of the settlement (who were not the same persons as the trustees of the will), upon trust to pay the income of the fund to the wife during the joint lives of herself and the husband, for her separate use, without power of anticipation; with remainder to the survivor for his or her life; and, from and after the death of the survivor, the trustees were to hold the trust fund in trust for the children of the marriage as therein mentioned, and in default of children in trust for such person or persons as the wife should, as therein mentioned, appoint; and in default of such appointment, if the wife should survive the husband, in trust for her absolutely; but, if she should not survive him, in trust for such person or persons as under the Statutes of Distribution would have become entitled thereto at the death of the wife, had she died possessed thereof intestate and without having been married.—The wife died before the husband, and while still an infant. There was no issue of the marriage, and she had not exercised the general power of appointment reserved to her by the settlement:—*Held*, that by the appointment under the power given to her by the mother's will, the wife had, subject to the limitations of the settlement, made the property her own; that on failure of those

INFANT—*continued.*
limitations there was a resulting trust for her and that the husband was entitled to the fund as her administrator. *In re* SCOTT. SCOTT *v.* HANBURY - - - - - - 298

INTERROGATORIES—Security for costs—Several defendants - - - - 367
See PRACTICE. 3.

INVESTMENT—Lands Clauses Act—College and university - - - - 677
See UNIVERSITY. 2.

—— Trustee - - - - 423, 501
See TRUSTEE. 1, 2.

JURY, TRIAL BY—Action in Chancery Division
See PRACTICE. 7. [484

LANDS CLAUSES ACT—Purchase-money — Investment—College and university
See UNIVERSITY. 1, 2. [333, 677

LEGAL ESTATE—Priority of mortgagor - 8
See MORTGAGE.

—— Right to call for—Failure of trust - 258
See TRUSTEE. 3.

LIEN—Solicitor—Costs - - - 590
See SOLICITOR. 3.

LIGHT—*Crown Property vested in Trustees—Sale by Trustees—Prerogative of the Crown—Prescription Act* (2 & 3 *Will.* 4, *c.* 71), *ss.* 1, 2, 3.] The general words in sect. 2 of the Prescription Act (2 & 3 Will. 4, c. 71) do not apply to an easement of light which is governed exclusively by sect. 3 and subsequent ancillary sections. In 1820 the site of the old Bankruptcy Court in Basinghall Street was purchased by the Government out of moneys provided by Parliament, the conveyance being taken to trustees for the Crown, which conveyance was confirmed by an Act passed in the 1st and 2nd Geo. 4, c. 115. In 1886 the site was sold to the corporation of the city of London by the Crown, and in 1890 it became vested in the Defendant under a building agreement with the corporation.—The Defendant, having commenced to erect buildings on the site which obstructed the access of light to windows in opposite buildings belonging to the Plaintiffs, these actions were commenced to restrain such building.—No prescriptive right to such access of light had been acquired prior to 1820 owing to the custom of London, which prior to the passing of the Prescription Act (2 & 3 Will. 4, c. 71), prevented the acquisition of such right, *Wynstanley* v. *Lee* (2 Sw. 333); but the Plaintiffs claimed that such right had been acquired under sects. 2 and 3 of the Prescription Act:—*Held*, that sect 2 did not apply to light; that the Crown not being named in sect. 3 was not bound by it; that the prerogative of the Crown prevented the Plaintiffs acquiring any right to the access of light over the site of the Defendant's buildings, and that the actions accordingly failed. PERRY *v.* EAMES. SALAMAN *v.* EAMES. MERCERS' COMPANY *v.* EAMES [658

LIMITATIONS, STATUTE OF—Concealed fraud —Fraud of partner - - 547
See PARTNERSHIP.

LIQUIDATOR—Liability of - - - 717
See Company. 15.

LOCAL GOVERNMENT ACTS — *Buildings in Streets—Building Line—House in course of Erection—"Front Main Wall of Building"—"On either side thereof"—"In the same Street"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 156—*Public Health (Buildings in Streets) Act*, 1888 (51 & 52 *Vict. c.* 52), *s.* 3.] In considering which is the "front main wall" of a house or building for the purposes of sect. 3 of the Public Health (Buildings in Streets) Act, 1888, and whether such house or building is "on either side of" or "in the same street" as a house or building in course of erection, for the purposes of the same section, all the circumstances of the case must be taken into consideration.—The building must be looked at as a whole; its character, its position, its distance from the house or building which is being erected or brought forward in alleged contravention of sect. 3, must be considered; a particular wing or other projection must not be selected, the front of which is to be treated as the "front main wall" which is to give the governing line, nor are two buildings necessarily "in the same street" for the purposes of the section, because one faces on the same road or street, or a continuation of the same road or street, as the other. Attorney-General *v.* Edwards - - - - - 194

2. —— *Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 51, 52—"*Water Company*"—*Water Supply—Own Profit.*] The undertaking of a waterworks company was transferred by statute to a borough. The profits of the waterworks were under a subsequent statute to be transferred to the borough improvement fund, or at the option of the corporation to be applied in reducing the price of water to consumers:—*Held*, that the corporation were supplying water for their own profit, and were a water company within the meaning of sect. 52 of the Public Health Act, 1875. Corporation of Wolverhampton *v.* Bilston Commissioners - - - - 315

MAINTENANCE—Infant—Contingent legacy *See* Infant. 1. [671

MANAGER — Action by debenture-holder or mortgagee - - 130, 136, n.
See Company. 3, 3A.

MANAGING OWNER — Commission — Private profit - - - - 390
See Ship.

MARRIED WOMAN - - - - 617
See Husband and Wife.

MAXIM OF LAW—"Actio personalis moritur cum personâ" - - - - 337
See Solicitor. 4.

MEMORANDUM OF ASSOCIATION — Alteration of - - - - - 649
See Company. 1.

MERCANTILE LAW—Ship's husband—Commission - - - - - 390
See Ship.

METROPOLITAN BUILDING ACT—*Party Structure—"Owner"—"Adjoining Owner"—Tenement—Notice by Building Owner—Injunction—Metropolitan Building Act*, 1855 (18 & 19 *Vict. c.* 122), *ss.* 3, 82, 85, *sub-s.* 1.] A tenant in possession of part of a house under an agreement for a greater interest than as tenant from year to year is an "adjoining owner," under the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), and entitled to be served with three months' notice under sect. 85, sub-sect. 1, before any alterations affecting his premises can be commenced by the "building owner"; in such a case service of a three months' notice on the person in receipt of the whole of the rents of the tenement is not sufficient. *Cowen* v. *Phillips* (33 Beav. 18) stated and followed. *Hunt* v. *Harris* (19 C. B. (N.S.) 13) discussed and explained. Fillingham *v.* Wood [51

MINE—*Royal Mine—Rights of Crown—"Gold Mine"—Gold mixed with base Metals*—1 *Wm. & M. c.* 30, *ss.* 1, 2, 3, 4—5 *Wm. & M. c.* 6, *ss.* 2, 3.] The relaxation in favour of the subject of the Royal prerogative in respect of Royal mines, which was effected by the Acts 1 Wm. & M. c. 30 and 5 Wm. & M. c. 6, does not apply to a mine which is worked simply as a gold mine, even though the gold is found mixed with the ores of the baser metals mentioned in the Acts, if the quantity of the baser metals is so small as to be valueless for the purpose of working.—In such a case the ancient prerogative of the Crown remains unaffected, and the mine cannot be worked by a subject, even on his own land, without the license of the Crown.—The decision of North, J., affirmed. —*Held*, also, by North, J., that in cases to which the Acts apply, the crown cannot be called upon to exercise the right of pre-emption given to it by the Act until the ore has been "washed and made clean and merchantable." It is not sufficient to offer the Crown quartz rock in the rough just as brought up from the mine. Attorney-General *v.* Morgan - - - C. A. 432

—— Settled Land Act—Improvement - 399
See Settled Land Act. 1.

MISREPRESENTATION — Partnership — Liability of co-partner - - 547
See Partnership.

MORTGAGE—*Priorities—Equitable Mortgagees—Fraud of Mortgagor—Title Deeds—Legal Estate—Negligence.*] W. made a legal mortgage of an estate with other property, and afterwards sold the estate to T., without notice of the mortgage, which appeared to have been forgotten, and handed the title-deeds to him. T., under a forged title, made an equitable mortgage of the estate to the Plaintiff (who believed that he had a good legal mortgage), and handed the forged title-deed to him. T. then made a second equitable mortgage, under the true title, to the Defendant (who also thought he had a legal mortgage), and handed the genuine title-deeds to him. Neither the Plaintiff nor the Defendant had, at the date of their respective securities, any notice of the prior legal mortgage; and the Defendant had no notice of the Plaintiff's mortgage. Afterwards the Defendant discovered the existence of the Plaintiff's mortgage and of the prior legal mortgage, and induced the legal mortgagees to reconvey the legal estate by a voluntary deed to W. freed from their mortgage (the remaining

MORTGAGE—*continued.*

property being sufficient for their security) on the express condition that W. should convey it to the Defendant, which he accordingly did, although he had at that time notice of the Plaintiff's mortgage. In an action by the Plaintiff, as first mortgagee, to establish his priority over the second mortgagee:—*Held* (reversing the decision of Kay, J.), that there was nothing in the circumstances under which the second equitable mortgagee obtained the legal estate to disentitle him to the protection thereby afforded, and that he was therefore entitled to priority over the first equitable mortgagee.—For a trust or equity to affect the conscience of a person who gets in the legal estate, it must be a trust or equity in favour of the person against whom the legal estate is set up, not in favour of a third party.—*Harpham* v. *Shacklock* (19 Ch. D. 207) explained.—*Per* Kay, J.:—In the case of two innocent persons taking equitable mortgages from a fraudulent mortgagor, mere carelessness or want of prudence on the part of the first mortgagee in taking his security is not sufficient to postpone him to the second; for that purpose the negligence must be "gross"—that is, so great as to make the first mortgagee responsible for the fraud committed on the second mortgagee; and, *semble*, the amount of negligence necessary to postpone a first mortgagee is the same whether his mortgage is legal or equitable. TAYLOR *v.* RUSSELL - C. A. 8

—— Charitable bequest—Mortmain - 682
See CHARITY. 2.

—— Company—Action by mortgagee—Receiver and manager - - - 136, n.
See COMPANY. 3A.

—— Company—Uncalled capital - - 173
See COMPANY. 2.

—— Costs — Solicitors' Remuneration Act — Further charge - - - 248
See SOLICITOR. 2.

—— Insufficient—Liability of solicitor - 337
See SOLICITOR. 4.

MORTMAIN—Waterworks—Mortgage - 682
See CHARITY. 2.

NEGLIGENCE—Priority of mortgages - 8
See MORTGAGE.

NEGOTIABLE SECURITIES—Foreign bonds payable to the bearer—Bonâ fide holder 270
See BANKER.

NEGOTIATION—Sale — Conditional contract — Remuneration of solicitor - - 105
See SOLICITOR. 1.

NEXT FRIEND—Suit without—Costs - 617
See HUSBAND AND WIFE.

PARISH CLERK—*Bankruptcy of Incumbent—Sequestration of Benefice—Vacancy during Sequestration—Minister for the time being—Appointment by Stipendiary Curate—Injunction—Sequestration Act*, 1871 (34 & 35 *Vict. c.* 45), *ss.* 1, 5, 6.] The rector of a parish having been adjudicated a bankrupt, the bishop issued a sequestration, and appointed and licensed a stipendiary curate for the performance of the ecclesiastical duties of

PARISH CLERK—*continued.*

the parish; the office of parish clerk having become vacant during the sequestration, the rector appointed the Plaintiff to be parish clerk, and, subsequently, the curate appointed the Defendant to the same office. On a motion by the Plaintiff to restrain the Defendant from receiving the fees and emoluments of the office:—*Held*, that the appointment of parish clerk had been rightly made by the rector, notwithstanding the sequestration, and that the Plaintiff was accordingly entitled to an injunction.—*Pinder* v. *Barr* (4 E. & B. 105) discussed and distinguished.—The rights and position of an incumbent after sequestration, except so far as they are interfered with by the express terms of the Sequestration Act, 1871, remain unaltered. LAWRENCE *v.* EDWARDS - - - 144

PARTNERSHIP — *Misrepresentation by a co-Partner—Concealed Fraud—Liability of Innocent Partner—Trustee and Cestui que Trust—Solicitor and Client—Statute of Limitations* (21 *Jac.* 1, *c.* 16) *—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8.] The decision in *Blair* v. *Bromley* (2 Ph. 354; 5 Hare, 542) does not proceed on any principle or rule of equity specially applicable to trustees, but rests upon principles of the law relating to representation and partnership, and is unaffected by the 8th section of the Trustee Act, 1888.—Between the years 1867 and 1874 the Plaintiff deposited divers sums of money with Messrs. M., G., & B., a firm of solicitors, for the purpose of investment. Representations were from time to time made to the Plaintiff, on behalf of the firm, that her money had been duly invested, and interest was paid to her by Messrs. M., G., & B. down to the death of G., in 1877, and by the surviving members of the firm down to 1886. In 1886 it was discovered that the Plaintiff's moneys had never, except as to one small sum, been invested, but had, in fact, been embezzled by a clerk of the firm.—In an action brought by the Plaintiff, after the death of all the partners, for the recovery of her money, G.'s executors pleaded the Statute of Limitations and the Trustee Act, 1888, sect. 8; and contended that the Act of 1888 had rendered the decision in *Blair* v. *Bromley* no longer applicable:—*Held*, that the decision in *Blair* v. *Bromley* was unaffected by the Trustee Act, 1888, and that the Plaintiff was entitled to be repaid the sums uninvested, with interest from 1886, out of the joint estate of the firm of M., G., & B.; and if such estate was not sufficient, then to recover the balance out of the separate estates of M., G., & B. MOORE *v.* KNIGHT - - - - - 547

—— Scope of authority—Firm of solicitors—Liability - - - - 337
See SOLICITOR. 4.

PARTY STRUCTURE—Metropolitan Building Act—Adjoining owner - - 51
See METROPOLITAN BUILDING ACT.

PAYMENT INTO COURT—Trustee Relief Act
See TRUSTEE RELIEF ACT. [151

PRACTICE—*Affidavit—Description of Deponent as "Gentleman"—Rules of Supreme Court*, 1883, *Order* XXXVIII., *rr.* 8, 14.] The decision in *In re Orde* (24 Ch. D. 271) does not justify the Central

PRACTICE—*continued.*

Office in refusing to file any affidavit in which the deponent is described only as "a gentleman." *In re* Dodsworth. Spence *v.* Dodsworth **657**

2. —— *Costs—Taxation—Apportionment of Costs.*] In an action for nuisance by vibration and by offensive behaviour, judgment was given for the Defendants on so much of the statement of claim as related to offensive behaviour, and damages were given to the Plaintiff on the ground of nuisance by vibration, which was the point on which the Plaintiff mainly relied. The judgment referred it to the Taxing Master to tax the Defendants' cost of so much of the action as related to offensive behaviour and to tax the Plaintiff's costs of the rest of the action, and the Taxing Master was to set off the said costs of the Defendants against the said costs of the Plaintiff, and to certify the balance; and the Defendants were ordered to pay such balance to the Plaintiff. The Taxing Master, in taxing the bill of costs brought in by the Plaintiff, allowed him one moiety of each item which related to both the issues, and allowed him in full the items which related solely to the issue on which he had succeeded, and followed the same rule in taxing the bill brought in by the Defendants. The result was that the Plaintiff had a small balance to receive. The Plaintiff appealed from this taxation:—*Held*, by Kekewich, J., and by the Court of Appeal, that this taxation was correct, and that though in the Queen's Bench Division this form of order would probably have been construed as giving the Plaintiff his costs of the action except so far as they had been increased by the issue on which he had failed, the settled practice in the Chancery Division was that under this form of order the general costs should be apportioned rateably between the issues. Jenkins *v.* Jackson **C. A. 89**

3. —— *Discovery—Security for Costs—Action against many Defendants—Appearance by several Solicitors—Severance of Defences—Interrogatories—Rules of Supreme Court*, 1883, *Order* xxxi., *r.* 26—*Construction.*] Several Defendants against whom an action was brought to make them liable for alleged misconduct, and also for the payment of large sums of money, appeared by different solicitors, and severed in their defences.—On a summons asking that each Defendant might be ordered to make an affidavit of documents, and for liberty to deliver interrogatories to each Defendant:—*Held*, that the Plaintiff company must pay into Court, under Order xxxi., rule 26, of Rules of Supreme Court, 1883, separate sums of £5 for each Defendant, both for discovery and for leave to serve interrogatories before an order could be made.—*Smith* v. *Reed* (W. N. (1883), 196) followed. Liverpool and Manchester Aërated Bread and Café Company *v.* Firth **[367**

4. —— *Discovery of Documents—Security for Costs—Application for further Deposit—Time for Application—Rules of Supreme Court*, 1883, *Order* xxxi., *r.* 26.] The power of the Court under Order xxxi., rule 26, to order payment into Court of an additional sum by way of security for costs of discovery in excess of the prescribed sum of £5, is not limited to the time when the order for discovery is made, but may be exercised at any time when the circumstances shew that further security is required.—When discovery of documents is made, it is not enough to make them up in bundles and number the bundles, but the documents in the bundles must be described, and each document must be marked or numbered specially, so that any party requiring a particular document may call for it. Cooke *v.* Smith **[C. A. 509**

5. —— *Order to attend and produce Documents—Third Party—Power to make Order ex parte—Right of Person Summoned to raise Objections to Production — Rules of Supreme Court*, 1883, *Order* xxxvii., *r.* 7.] An order made under rule 7 of Order xxxvii. for the attendance of a person for the purpose of producing documents is equivalent to a subpœna duces tecum, and has the same effect. Such an order, though unqualified in its terms, means that the person named in it must attend with the documents therein mentioned; but it is then open to him to raise any legal objection to the production of any particular document which he is asked to produce.—The production under rule 7 is not a production for the purpose of private inspection, but must have reference to some proceeding in the litigation.—An order under rule 7 may be made ex parte, and it may be made upon a person who is not a party to the action. *In re* Smith. Williams *v.* Frere - - - - - - **323**

6. —— *Security for Costs—Appellant resident Abroad—Assets within the jurisdiction—Fluctuating Assets.*] A French company appealed from an order. The Respondents applied for security for costs. The Appellants shewed that they had a branch business as mineral water merchants in England, which they carried on in leasehold premises, where they had a stock-in-trade worth £12,000, plant, horses, and vans worth about £1200, and a large amount of book debts. The Respondents contended that this was floating property easily removable, and did not exempt the Appellants from giving security:—*Held*, that there was no reasonable doubt that the Respondents, if the appeal was dismissed with costs, would find ample goods on which execution could be levied, and that security ought not to be ordered. *In re* Apollinaris Company's Trade-marks **C. A. 1**

7. —— *Trial by Jury—Action in Chancery Division—Rules of Supreme Court*, 1883, *Order* xxxvi., *rr.* 6, 7.] The words "in any other cause or matter" in Order xxxvi., rule 6, do not mean in any cause or matter other than one in which the mode of trial has been fixed under rules 2–7, but mean in any cause or matter other than those mentioned or referred to in those rules. Rule 6, therefore, does not apply to an action in the Chancery Division, and a party to such an action cannot claim a trial by jury as a matter of right. In such an action the Court may under rule 7 direct a trial by jury, but the onus is on the party applying for it to shew that the action is one which ought to be so tried.—An action was brought in the Chancery Division for an injunction to restrain trespass on mines and for an account of minerals gotten. Glamorganshire was named as the place of trial. The case turned on

PRACTICE—*continued.*
the question whether the land from which the minerals had been gotten was part of the Plaintiff's estate or part of the waste of the manor. The Plaintiff applied for a trial at Cardiff by a special jury. Stirling, J., on the ground that the case would involve an examination of many documents, ordered the action to be tried at Cardiff Assizes without a jury:—*Held*, on appeal, that though the Plaintiff could not claim a jury as a matter of right, the importance of a view was so great that a trial by jury ought to be ordered. JENKINS *v.* BUSHBY - C. A. 484
—— Pleading Statute of Frauds - - 384
See FRAUDS, STATUTE OF.
—— Receiver—Company—Debenture-holders
See COMPANY. 3. [133
—— Receiver—Company—Mortgagee 136, n.
See COMPANY. 3A.
—— Staying proceedings—Action against company in liquidation - - 496
See COMPANY. 13.
—— Trustee Relief Act - - - 151
See TRUSTEE RELIEF ACT.
—— Winding-up of company - - 187, 475
See COMPANY. 10, 11.
PRESCRIPTION—Ancient lights—Prerogative of Crown - - - - 658
See LIGHT.
PRINCIPAL AND AGENT—Agent appointed by parol - - - - - 384
See FRAUDS, STATUTE OF.
PRIORITY — Mortgage — Negligence — Legal estate - - - - 8
See MORTGAGE.
PRODUCTION OF DOCUMENTS—Order to attend and produce - - - 323
See PRACTICE. 5.
—— Security for costs - - 367, 509
See PRACTICE. 3, 4.

RECEIVER—Company — Action by debenture-holder or mortgagee - 133, 136, n.
See COMPANY. 3, 3A.
—— Company—Action by debenture-holder — Winding-up - - - 187, 475
See COMPANY. 10, 11.
REDUCTION OF CAPITAL—Company - 396
See COMPANY. 5.
REGISTRATION—Trade-mark - - 41
See TRADE-MARK.
RESCISSION—Contract by letters — Subsequent correspondence - - - 412
See VENDOR AND PURCHASER. 3.
RESCISSION OF CONTRACT—Conditions of sale
See VENDOR AND PURCHASER. 2. [601
RESTRAINT ON ANTICIPATION — Separate estate—Costs against married woman 617
See HUSBAND AND WIFE.
RESTRAINT OF TRADE—*Agreement—Validity—Reasonableness—Intention of Parties.*] An agreement for the employment of the Defendant as a traveller provided, that he was to "call upon and solicit orders" for all articles in the way of
RESTRAINT OF TRADE—*continued.*
the Plaintiffs' business of antiseptic manufacturers, and in the event of the termination of the agreement, that he should not, either on his own account or for any employer, "call upon, or directly or indirectly solicit orders from, or in any way deal or transact business with," any one who had, while the agreement was in force, been a customer of the Plaintiffs. After the termination of the agreement, the Defendant entered the employment of rival antiseptic manufacturers, and, as their traveller, called upon and solicited orders from some of the Plaintiffs' customers. On motion by the Plaintiffs to restrain the Defendant from committing any further breach of the agreement:—*Held*, by Chitty, J., and by the Court of Appeal, that the meaning of the agreement, according to its true construction, was to prevent the Defendant, after leaving the Plaintiffs' employ, from transacting, with persons who had been customers of the Plaintiffs while the agreement was in force, business of a similar kind to that carried on by the Plaintiffs; that this was not a greater restraint than was necessary for the protection of the employers; and that the agreement was therefore valid and could be enforced to this extent.—Principles on which agreements in restraint of trade should be construed stated. MILLS *v.* DUNHAM - - - C. A. 576
RETAINER OF SOLICITOR—Implied - 337
See SOLICITOR. 4.
RULES OF SUPREME COURT, 1883, Order XIX., r. 15 - - - - 384
See FRAUDS, STATUTE OF.
—— **Order XXXI., r. 26** - - 367, 509
See PRACTICE. 3, 4.
—— **Order XXXVI., rr. 6, 7** - - 484
See PRACTICE. 7.
—— **Order XXXVII., r. 7** - - - 323
See PRACTICE. 5.
—— **Order XXXVIII., rr. 8, 14** - - 657
See PRACTICE. 1.
RULES OF SUPREME COURT, 1886 (FUNDS), rr. 2, 41 - - - - 151
See TRUSTEE RELIEF ACT.

SCALE FEE—Solicitors' Remuneration Act
See SOLICITOR. 1, 2. [105, 248
SCHEME OF ARRANGEMENT—Bankruptcy
See BANKRUPTCY. 2. [695
SECURITY FOR COSTS—Appellant abroad 1
See PRACTICE. 6.
—— Discovery of documents - 367, 509
See PRACTICE. 3, 4.
SEQUESTRATION — Benefice—Appointment of parish clerk - - - 144
See PARISH CLERK.
—— Motion to restrain—Winding-up of company—Scotch hypothec - - 305
See COMPANY. 12.
SETTLED LAND ACT—*Application of Capital Money—"Improvements"—Mines—Erection of new Pumps—Devise of Real Estate to uses of Settlement, and bequest of Personalty in trust to invest in Land, to be settled to the same uses—*

SETTLED LAND ACT—*continued.*

Application of uninvested Personalty in improvements on Lands originally settled—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2, 21, 25, *sub-ss.* (*xix.*), (*xx.*), 33.] Lands under which there were mines were settled by deed in 1872. In 1874 the settlor by his will devised other real estates of his own to the trustees for the time being of the settlement, and directed that they should stand possessed thereof to the uses declared by the settlement concerning the lands comprised therein. And he bequeathed his residuary personal estate to his executors (one of whom was a trustee under the settlement), upon trust to invest the same in the purchase of land, and to settle the land so purchased to the uses declared concerning his real estates thereinbefore devised.—It was proposed to apply some of the personal estate of the testator, which had not yet been invested in land, in the erection of a new pumping engine and pumps for draining some mines included in the original settlement:—*Held*, by North, J., that the proposed works were improvements authorized by sect. 25, sub-s. (xx.), of the Settled Land Act, 1882:—*Held*, also, by the Court of Appeal, that the settlement and will constituted one settlement under sect. 2, sub-s. (1), and that the personalty in the hands of the executors was "capital money," which might be applied in improvements on the estates comprised in the settlement, although it had never been invested in land.—*In re Mackenzie's Trusts* (23 Ch. D. 750) and *In re Tennant* (40 Ch. D. 594) approved. *In re* MUNDY'S SETTLED ESTATES - - - - C. A. 399

2. —— *Trust for Sale* (45 & 46 *Vict. c.* 38), *ss.* 3, 63—*Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *s.* 6, *sub-s.* 1, *s.* 7, *sub-ss. i., ii.*] In a case where land was held on trust for sale and there were no trusts prior to the interest of tenants for life of the income, leave was given to the tenants for life under sect. 7 of the Settled Land Act, 1884, to sell such of the land as remained unsold. *In re* HARDING'S ESTATE - - - 60

SETTLEMENT—Infant—Failure of Limitations—Resulting Trust - - - 298
See INFANT. 2.

—— Two or more documents—Settled Land Act
See SETTLED LAND ACT. 1. [399

—— Void against creditors—Purchaser for value
See FRAUDULENT CONVEYANCE. [31

—— Voluntary—Assignment of debts—Debts got in by settlor - - - 82
See VOLUNTARY SETTLEMENT.

SHARES—Application for—Fictitious name 202
See COMPANY. 8.

—— Issued at a discount - - - 66
See COMPANY. 4.

—— Paid-up—Contributory - - 119
See COMPANY. 9.

SHAREHOLDERS—Preference and ordinary—Distribution of surplus assets - 155
See COMPANY. 14.

SHIP—*Mercantile Law—Managing Owner—Ship's Husband—Ship-broker—Charters—Freights—Secret Profit—Commission—Brokerage—Custom.*] In the absence of any special bargain, the managing owner of a ship is not entitled

SHIP—*continued.*

to retain, or to charge against the ship, any profit for himself, either by way of commission or otherwise, for procuring charters or freights, whether he be a ship-broker and procures them himself, or employs another broker for the purpose, the procuring of charters and freights being part of the duties incidental to the office of managing owner. WILLIAMSON *v.* HINE - - 390

SOLICITOR—*Bill of Costs—Scale Fee—Conveyancing—Negotiation of Sale by Private Contract—Contract conditional on Sanction of Court—Payment of Fee to Estate Agent—General Order under Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *Sched. I., Part I., r.* 11.] The solicitor to the trustees of property which was the subject of an action in the Chancery Division negotiated a sale thereof, and prepared, and procured the due signature of, a contract of sale and purchase conditional upon the sanction of the Court being given to it. In the course of the negotiation and for the purpose of obtaining evidence to induce the Court to sanction the sale, he procured the opinions of two valuers, to whom fees were paid for reporting as to the value of the property, but who took no further part in the negotiation. The contract was sanctioned by the Court without alteration:—*Held* (reversing the decision of Kay, J.), that the solicitor had negotiated the sale within the meaning of rule 11 in Sched. I., Part. I., to the General Order, and was entitled to the scale fee for negotiating a sale by private contract. *In re* MACGOWAN. MACGOWAN *v.* MURRAY - - - - - C. A. 105

2. —— *Bills of Costs—Scale Fee—Mortgage—Further Charge—Previous investigation of Title General Order under Solicitors' Remuneration Act*, 1881, *Sched. I., Part I., r.* 10.] The tenant for life of settled estates had created charges on his life estate for sums amounting in the whole to £192,000, and the charges had all become vested in an insurance company. A private Act was passed which empowered the trustees of the settlement to raise, by mortgaging the settled estates in fee, any sum not exceeding £350,000, for the purpose of paying the debts of the tenant for life. The trustees executed a mortgage of the estates in fee to the company to secure £232,000. Of this sum £192,000 was retained by the company in satisfaction of the charges on the life estate (which were released by a separate deed), and £40,000 was paid to the trustees:—*Held*, by North, J., affirming the decision of the Taxing Master, that the transaction amounted to a further charge within the meaning of rule 10 in Part I. of Sched. I. to the Solicitors' Remuneration Order, 1882; that the title to the property had been in substance already investigated within the meaning of that rule; and that the mortgagees' solicitor was not entitled to any scale fee in respect of the mortgage, but must be remunerated under Sched. II. to the Order:—*Held*, on appeal, that the transaction was a new mortgage, and not a further charge, and therefore did not fall within rule 10, and that the mortgagees' solicitor was entitled to the scale fee on a mortgage for £232,000. EARL OF AYLESFORD *v.* EARL POULETT [C. A. 248

3. —— *Lien for Costs—Extent of Lien—*

SOLICITOR—*continued.*

Security—Waiver of Lien.] A firm of solicitors received for some years on behalf of a lady the income payable to her under the trusts of a will, and from time to time made advances to her and payments on her account. On being applied to for delivery up of her papers, they sent in an account of their receipts and payments shewing a balance of £81 due to them, and claimed a lien for that sum. The only item in the account of such a nature that the Taxing Master could have moderated it was "Our costs to date, £20." She applied for an order for delivery of her papers on payment of £20 into Court. Stirling, J., refused the application, holding that the £81 ought to be paid into Court:—*Held*, by the Court of Appeal, that a solicitor's lien extends only to his taxable costs, charges, and expenses, which category includes all disbursements which can be moderated by the Taxing Master and are not necessarily allowed in full on being vouched, but does not include ordinary advances; that there therefore was no lien for anything more than so much of the £20 as should be allowed on taxation, and that the order asked for ought to have been made.—After the decision of Stirling, J., the new solicitors of the lady discovered that she and her husband had given to the solicitors a joint and several promissory note, payable on demand, and bearing interest at £5 per cent., as security for what was due from her:—*Held*, that whether the taking security by a person having a lien is an abandonment of the lien depends on the intention, whether expressed or to be gathered from the circumstances of the case; that primâ facie where a solicitor whose duty it is to advise his client as to his rights and liabilities takes from his client a security for costs without explaining that he intends to reserve his lien, the lien is abandoned, and that such was the result in the present case. *In re* TAYLOR, STILEMAN, & UNDERWOOD - - - - - **C. A. 590**

4. —— *Retainer implied — Mortgagees and Trustees—Trust Fund, Improper Investment of—Breach of Trust—Negligence of Solicitor—Liability of Partners — Notice — "Actio personalis moritur cum personâ."*] Funds, subject to the trusts of a settlement, were invested in Exchequer bills, on the sale of which the proceeds were paid to the account of a firm of solicitors—F., S., and F.—at their bankers. The funds were afterwards advanced on a mortgage of house property in a new neighbourhood, and of inadequate value. At that date there were no trustees of the settlement, and the mortgage was taken in the names of S. and two other persons who were then proposed, and shortly afterwards appointed new trustees, and never repudiated the transaction. S. was the member of his firm who acted for them in all the matters, and for the work which he did the firm, by arrangement, received, at the time when the money was advanced, payment for their bill of costs out of the funds. The mortgage proved to be an insufficient security, and in an action against the trustees it was held that they were jointly and severally liable to make good the loss sustained. The property not having been sold, or the trust funds replaced, beneficiaries sought to make the firm of solicitors

SOLICITOR—*continued.*

liable for the loss of the funds on the ground of negligence, though S.'s partners had not had any personal knowledge of the property at the time when the mortgage transaction was completed:—*Held*, that in all that S. had done in the matter of the mortgage, he acted within the scope of his authority as a partner, that his firm must be taken to have had knowledge that the security was, for trustees, improper, and that, consequently, they were implicated in and jointly and severally liable for the breach of trust; and, further, that the judgment which had been recovered against S., as one of the trustees, had not discharged his partners from liability:—*Held*, also that, though there had not been an express retainer, the relation of solicitor and client might be inferred from the acts of the parties; that it subsisted between the firm and the trustees, and that the firm were liable in damages for the negligence of S. for failure in discharge of the duty which had been undertaken to the clients:—*Held*, also, that the liability extended to the estate of a member of the firm since deceased. BLYTH *v.* FLADGATE. MORGAN *v.* BLYTH. SMITH *v.* BLYTH - **337**

—— Fraud of partner—Statute of Limitations *See* PARTNERSHIP. [**547**

STAMPS— Unstamped instrument — Promissory note - - - - - **568**
See EVIDENCE. 1.

STATUTES:

13 Eliz. c. 5, ss. 1, 5—*Fraudulent Conveyances*
See FRAUDULENT CONVEYANCE. [**31**

21 Jac. 1, c. 16—*Limitations* - - **547**
See PARTNERSHIP.

29 Car. 2, c. 3, s. 7—*Statute of Frauds* - **384**
See FRAUDS, STATUTE OF.

1 Wm. & M. c. 30—*Gold Mines* - - **432**
See MINE.

5 Wm. & M. c. 6—*Gold Mines* - - **432**
See MINE.

9 Geo. 2, c. 36—*Mortmain Act* - - **682**
See CHARITY. 2.

2 & 3 Will. 4, c. 71, ss. 1, 2, 3—*Prescription*
See LIGHT. [**658**

3 & 4 Will. 4, c. 74, ss. 1, 15, 19, 40, 77—*Fines and Recoveries* - - - **524**
See TENANT IN TAIL.

8 & 9 Vict. c. 18, s. 69—*Lands Clauses* - **677**
See UNIVERSITY. 2.

10 & 11 Vict. c. 96—*Trustee Relief* - **151**
See TRUSTEE RELIEF ACT.

17 & 18 Vict. c. 36—*Bills of Sale* - **627**
See BILL OF SALE. 2.

18 & 19 Vict. c. 43, ss. 1, 2—*Infants' Settlement*
See INFANT. 2. [**298**

18 & 19 Vict. c. 122, ss. 3, 82, 85, sub-s. 1—*Metropolitan Building* - - **51**
See METROPOLITAN BUILDING ACT.

21 & 22 Vict. c. 44, ss. 27, 28—*Universities Estates* - - - **333, 677**
See UNIVERSITY. 1, 2.

25 & 26 Vict. c. 89, s. 23—*Companies* - **202**
See COMPANY. 8.

—— —— s. 85 - - - - **496**
See COMPANY. 13.

STATUTES—*continued.*

25 & 26 Vict. s. 87 - - - - 187
See COMPANY. 10.

—— —— ss. 87, 163 - - - 305
See COMPANY. 12.

—— —— s. 138 - - - - 717
See COMPANY. 15.

30 & 31 Vict. c. 131, s. 9—*Companies* - 396
See COMPANY. 5.

—— —— s. 25 - - - - 119
See COMPANY. 9.

33 & 34 Vict. c. 97, s. 54—*Stamp Act* - 568
See EVIDENCE. 1.

33 & 34 Vict. c. 104, s. 2—*Companies Arrangement Act* - - - - 213
See COMPANY. 7.

34 & 35 Vict. c. 45, ss. 1, 5, 6—*Sequestration*
See PARISH CLERK. [144

36 & 37 Vict. c. 66, s. 24, sub-s. 5—*Judicature Act* - - - - - 496
See COMPANY. 13.

38 & 39 Vict. c. 55, ss. 4, 51, 52—*Public Health*
See LOCAL GOVERNMENT ACTS. 2. [315

—— —— s. 156 - - - - 187
See LOCAL GOVERNMENT ACTS. 1.

41 & 42 Vict. c. 31—*Bills of Sale* - 627
See BILL OF SALE. 2.

43 & 44 Vict. c. 46, ss. 2, 4—*Universities Estates*
See UNIVERSITY. 1, 2. [333, 677

44 & 45 Vict. c. 41, s. 43—*Conveyancing* 671
See INFANT. 1.

44 & 45 Vict. c. 44—*Solicitors' Remuneration*
See SOLICITOR. 1, 2. [105, 248

45 & 46 Vict. c. 38, ss. 2, 21, 25, arts. xix., xx.—*Settled Land* - - - 399
See SETTLED LAND ACT. 1.

—— ——, ss. 3, 63 - - - 60
See SETTLED LAND ACT. 2.

45 & 46 Vict. c. 43, ss. 8, 9, Sched.—*Bills of Sale* - - - - - 464
See BILL OF SALE. 1.

—— —— s. 17 - - - - 627
See BILL OF SALE. 2.

45 & 46 Vict. c. 75, ss. 1, 2—*Married Women's Property* - - - - 524
See TENANT IN TAIL.

—— —— ss. 1 (sub-s. 2), 19 - - 617
See HUSBAND AND WIFE.

46 & 47 Vict. c. 52, s. 18, sub-ss. 12, 13, s. 44 (1)—*Bankruptcy* - - - 695
See BANKRUPTCY. 2.

—— —— s. 37 - - - - 4
See BANKRUPTCY. 1.

46 & 47 Vict. c. 57, ss. 69, 71, 72, 74, sub-s. 2—*Patents, Designs, and Trade Marks* 41
See TRADE-MARK.

47 & 48 Vict. c. 18, s. 6, sub-s. 1; s. 7, sub-ss. 1, 2—*Settled Land* - - - 60
See SETTLED LAND ACT. 2.

51 & 52 Vict. c. 52, s. 3—*Public Health* 194
See LOCAL GOVERNMENT ACTS. 1.

51 & 52 Vict. c. 59, s. 8—*Trustees* - 547
See PARTNERSHIP.

STATUTES—*continued.*

52 & 53 Vict. c. 32, s. 3—*Trust Investments*
See TRUSTEE. 1. [423

53 & 54 Vict. c. 62, s. 1, sub-ss. 2, 4, 5 (*a*), (*b*)—*Companies* - - - - 649
See COMPANY. 1.

53 & 54 Vict. c. 63, s. 32, sub-s. 2—*Companies Winding-up* - - - 496
See COMPANY. 13.

STAYING PROCEEDINGS—Action against company in liquidation - - 496
See COMPANY. 13.

SURPLUS ASSETS—Company—Ordinary and preference shareholders - - 155
See COMPANY. 14.

—— Company—Original and discount shareholders - - - - 66
See COMPANY. 4.

TENANT IN TAIL—*Conveyance—Base Fee—Fee Simple Absolute—Married Woman—Acknowledgment by—Concurrence of Husband—Fines and Recoveries Act* (3 & 4 *Will.* 4, *c.* 74), *ss.* 1, 15, 19, 40, 77—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 1, *s.* 2.] By an indenture, dated in 1884, and duly enrolled, A. and B. being then spinsters, and entitled, as tenants in tail in remainder under the will of W., to certain lands, barred their estates tail, and conveyed the lands to S., thereby passing to S. a base fee in remainder, the consent of the protector of the settlement not having been obtained.—In August, 1889, the protector of the settlement died, and the base fee fell into possession. A. and B. married after the commencement of the Married Women's Property Act, 1882.—In December, 1889, A. and B., being then married, executed an indenture, which was duly enrolled, for the purpose of turning the base fee into a fee simple absolute in favour of S. This deed was in the usual form, but was not acknowledged by A. and B., nor did their husbands concur in it. The deed purported to convey and dispose of the lands to the use of S. in fee, discharged not only from the estates tail barred by the indenture of 1884, but also from all remainders over on the determination or in defeasance of such estates.—On a sale of part of the lands, the purchaser took an objection to the title on the ground that the indenture of December, 1889, had not been acknowledged by A. and B., nor concurred in by their husbands, as required by sect. 40 of the Fines and Recoveries Act:—*Held*, that the effect of sect. 1, sub-sect. 1, and sect. 2 of the Married Women's Property Act, 1882, was, under the circumstances, to render the acknowledgment of the deed of December, 1889, by A. and B., and the concurrence therein of their husbands, as required by sect. 40 of the Fines and Recoveries Act, unnecessary, and that therefore the deed was effectual to pass the fee simple absolute to S. *In re* DRUMMOND & DAVIE'S CONTRACT - - - - - 524

TITLE-DEEDS—Possession of—Equitable Mortgages—Priority - - - 8
See MORTGAGE.

TRADE—Restraint of - - - 576
See RESTRAINT OF TRADE.

TRADE-MARK — *Old Mark — Foreign Manufacturer — User — Common Particular — Disclaimer — Amendment of Application — Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 69, 71, 72, 74, *sub-s.* 2.] The Court has no power judicially to amend an application under sect. 69 of the Patents, Designs, and Trade Marks Act, 1883, by directing the Comptroller to proceed with the registration of the essential part of a proposed trade-mark.—*Orr-Ewing* v. *Registrar of Trade Marks* (4 App. Cas. 479) stated and explained.—An applicant seeking to register as an old mark, a distinctive device and combination of words, must shew that the whole combination, just as he proposes to register it, has been used in its entirety prior to the 13th of August, 1875.—*In re J. B. Palmer's Trade Mark* (24 Ch. D. 504) discussed and applied.—An originally defective or wrongful application cannot be corrected by subsequent disclaimer; the direction in the Patents, Designs, and Trade Marks Act, 1883, s. 74, sub-s. 2, as to disclaiming the right to exclusive use of common particulars in the application, is express, and must be strictly complied with.—*Semble*, the importation of goods, marked with a distinctive brand or label, for purposes of transhipment only, is not sufficient user to acquire a title in such brand or label. *In re* MEEUS' APPLICATION - - - - - - 41

TRUST—Failure of—Infant's settlement—Resulting trust - - - - 298
See INFANT. 2.

—— Failure of—Title of trustee—Legal estate
See TRUSTEE. 3. [258

—— For sale—Settled Land Act - - 60
See SETTLED LAND ACT. 2.

TRUSTEE—*Investment of Trust Funds—Instrument giving no Power to vary Investments—Power to vary existing Securities—Trust Investment Act*, 1889 (52 & 53 *Vict. c.* 32), *s.* 3.] A testator bequeathed his residuary estate to trustees upon trust to convert it and invest it in the public stocks or funds of Great Britain, and to apply it in the purchase of lands to be settled, and in the meantime to pay the income to the persons for the time being entitled in possession under the limitations of the settlement. No power to vary securities was given. The trustees had in hand large amounts of Government stocks arising from the residuary estate, and purchased long before the Trust Investment Act, 1889, came into operation:—*Held* (reversing the decision of Stirling, J.), that under the Trust Investment Act, 1889, sect. 3, the trustees had power to sell these stocks for the purpose of investing the proceeds in other stocks, funds, or securities authorized by that section.—The words at the end of sect. 3, "to vary any such investment," are not to be confined to investments made under the power given by the Act, but extend to any investment, whenever made, upon any such stocks, funds, or securities as are mentioned in the section. *In re* DICK. LOPES *v.* HUME-DICK - - - - C. A. 423

2. —— *Investment — Will — Construction — Company Incorporated by Act of Parliament — Charter granted in pursuance of a Statute.*] By an Act of Parliament the Crown was empowered to grant a charter of incorporation to a marine insurance company, with certain special privileges and limitations. In pursuance of this Act the Crown granted a charter to the London Assurance. By a subsequent Act the capital stocks of the London Assurance and another corporation were amalgamated, and the name and seal of the London Assurance were to be used for both corporations, and the London Assurance was to exercise the powers of both corporations.—A trustee of a will, who had power to invest in shares of "any company incorporated by Act of Parliament," invested in shares of the London Assurance:—*Held*, that the London Assurance was a company incorporated by Act of Parliament within the meaning of the investment clause.—*Semble*, that if the London Assurance had not been originally within the terms of the investment clause, it would not have come within the terms by virtue of the subsequent Act amalgamating its stock with that of another corporation and enlarging its powers. ELVE *v.* BOYTON [C. A. 501

3. —— *Real Estate—Devise in Trust—Failure of Heir of Beneficiary—Legal Estate—Right to Call for Conveyance.*] Under the will of A., who died in 1859, B. was entitled, subject to certain life interests, to an equitable reversion in fee in a freehold messuage, the legal estate in which was vested in P. and two other persons as the trustees of A.'s will.—B., who died in 1868, by his will devised all his real and personal estate to M. and another person upon trust to pay to his wife or to permit her to receive the annual produce thereof during her life or widowhood, and after her death or second marriage, upon trust for his (B.'s) son George H., his heirs, executors, administrators, and assigns; and B. empowered his trustees with his wife's consent in writing, and after her death and during the minority of his said son, in their discretion, to sell any part of his real estate, and to convey it to the purchaser.—George H., who was illegitimate, attained twenty-one, and died intestate and without issue in 1880.—B.'s widow died in 1886; and upon the death, in 1889, of the survivor of the persons entitled to life interests in the freehold messuage, M., the surviving trustee of B.'s will, claimed to have become absolutely entitled to the freehold messuage, and called upon P., who was in possession thereof as the surviving trustee of A.'s will, for a conveyance thereof:—*Held*, by the Court of Appeal (reversing the decision of Kekewich, J.), that M. was not entitled to call for a conveyance from P. of the freehold messuage in question.—*Doe* v. *Biggs* (2 Taunt. 109) criticised and doubted.—*Onslow* v. *Wallis* (1 Mac. & G. 506) distinguished. *In re* LASHMAR. MOODY *v.* PENFOLD - - - C. A. 258

—— Fraud of partner—Statute of Limitations
See PARTNERSHIP. [547

—— Liquidator of company—Liability - 717
See COMPANY. 15.

TRUSTEE RELIEF ACT — *Practice—Trustee — Payment into Court—Chancery Funds Consolidated Rules*, 1874, *r.* 34—*Trustee Relief Act*, 1847 (10 & 11 *Vict. c.* 96)—*Chancery Funds (Amended) Orders*, 1874, *Order* 5—*Supreme Court Funds Rules*, 1886, *rr.* 2, 41—*Notice to Persons entitled to Fund.*] A trustee who pays a fund into Court

TRUSTEE RELIEF ACT—*continued.*
under the Trustee Relief Act, not being required since the repeal of the Chancery Funds Consolidated Rules, 1874, to set forth in his affidavit the names of the persons entitled to the fund, is no longer bound to give notice to such persons under Order 5 of the Chancery Funds (Amended) Orders, 1874, that order having been rendered of no effect by such repeal. *In re* GRAHAM'S TRUSTS - 151

ULTRÀ VIRES ACT—Issue of shares at a discount - - - - - 66
See COMPANY. 4.

UNIVERSITY—*College—Erection of new Buildings—Application of Purchase-money of Land paid into Court under Lands Clauses Consolidation Act—Repayment by Instalments—Consent of Board of Agriculture—Universities and College Estates Act*, 1858 (21 & 22 *Vict. c.* 44), *ss.* 27, 28—*Universities and College Estates (Amendment) Act*, 1880 (43 & 44 *Vict. c.* 46), *ss.* 2, 4.] The effect of sect. 4 of the Universities and College Estates (Amendment) Act, 1880, is, that money which has arisen from the sale of land belonging to a college to a railway company, under the Lands Clauses Consolidation Act, 1845, and which is standing in Court, cannot be applied in the manner provided by sect. 2 of the first-mentioned Act without the consent of the Board of Agriculture. *Ex parte* KING'S COLLEGE, CAMBRIDGE - - 333

2. —— *College—Erection of new Buildings—Application of Purchase-money of Land paid into Court under Lands Clauses Consolidation Act—Repayment by Instalments—Universities and College Estates Act*, 1858 (21 & 22 *Vict. c.* 44), *ss.* 27, 28—*Universities and College Estates (Amendment) Act*, 1880 (43 & 44 *Vict. c.* 46), *ss* 2, 4—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 69.] The effect of sects. 27 and 28 of the Universities and College Estates Act, 1858, in conjunction with sects. 2 and 4 of the Universities and College Estates Amendment Act, 1880, is to provide, in the case of land belonging to a university or a college which is taken compulsorily under the provisions of the Lands Clauses Consolidation Act, 1845, another mode of investment of the purchase-money in addition to those mentioned in sect. 69 of the Lands Clauses Consolidation Act. *Ex parte* KING'S COLLEGE, CAMBRIDGE [677

USER—Trade-mark—Foreign manufacturer 41
See TRADE-MARK.

VENDOR AND PURCHASER—*Conditions of Sale—Misleading Condition of Sale—Assumption of Facts on which the Root of the Title depends.*] A condition of sale requiring the purchaser to assume certain facts is not misleading, if the vendor believes the facts to be true, even though the condition is intended to cover a flaw which goes to the root of the title. In such a case it is not necessary to explain in the condition the specific defect in the title which the condition is intended to cover. *In re* SANDBACH AND EDMONDSON'S CONTRACT - - - - C. A. 99

2. —— *Conditions of Sale—Right to Rescind "notwithstanding previous Litigation."*] A vendor sold an estate under conditions of sale, one of which was, that if the vendor should be unable or unwilling to meet any requisition or objection, he might annul the sale and return the purchaser's deposit, without interest or costs, notwithstanding any previous negotiation or litigation. An objection to the title having been taken by the purchaser, the vendor took out a summons under the Vendor and Purchaser Act to decide the question, and judgment was given against him:—*Held*, that it was too late for the vendor, after the judgment, to exercise his power of annulling the sale. *In re* ARBIB AND CLASS'S CONTRACT - - - - C. A. 601

3. —— *Contract in Letters—Subsequent Correspondence—Want of Title—Rescission of Contract—Damages.*] On the 17th of April, 1889, the Defendant's agent wrote to the Plaintiff's agent offering £800 for a house of the Plaintiff. On the 25th the Plaintiff's agent, by his authority, wrote, accepting the offer, and stating that possession would be given at Midsummer. The Plaintiff's solicitors sent to the Defendant's solicitor a draft contract containing special conditions, which the Defendant's solicitor struck out. On the 14th of May the Plaintiff's solicitors wrote to the Defendant's solicitor: "We cannot consent to all your alterations, which, in fact, make the contract almost an open one." On the 17th the Defendant's solicitor sent back the draft with a letter stating that he could not advise his client to go on with the negotiations. The Plaintiff's solicitors sent back the draft with some variation and with the abstract of title, from which it appeared that the land was enfranchised copyhold, and that the vendor had not the mines. On the 20th of May the Defendant's solicitor wrote to the Plaintiff's solicitors that, as the Plaintiff had not the mines, he could not advise his client to go on with the matter. The Defendant accordingly refused to proceed. The Plaintiff negotiated with the lord of the manor for the purchase of the mines, but did not obtain a conveyance of them till September. In the meantime, on the 22nd of June, 1889, the Plaintiff commenced this action for specific performance or damages. North, J., held, that the letters of April constituted a contract, and that it was not affected by the subsequent correspondence; but that, as the Plaintiff had occasioned the difficulty by insisting on stipulations to which he was not entitled, the action must be dismissed. The Plaintiff appealed:—*Held*, by the Court of Appeal, that, as in May, 1889, the vendor had not power to convey the mines, nor power to compel a conveyance of them from any other person, the purchaser was entitled, upon discovering this, to rescind the contract, though the time to be allowed for completion had not expired, and that specific performance could not be decreed:—*Held*, further, that the Plaintiff could not sustain a claim for damages for breach of contract, since he was not, on the 24th of June (which must be treated as the end of the time allowed for completion), in a position to give the Defendant such a conveyance as the Defendant was entitled to.—Whether, if on the 24th of June the Plaintiff had been able

VENDOR AND PURCHASER—*continued.*
and willing to give the Defendant a proper conveyance, he would not have been entitled to damages for the Defendant's breach of contract, *quære.* BELLAMY *v.* DEBENHAM - **C. A. 412**
—— Purchase by agent in his own name—Denial of agency - - - **384**
See FRAUDS, STATUTE OF.

VOLUNTARY SETTLEMENT—*Complete or Incomplete Assignment of Debts—Debts got in by Settlor—Liability of Settlor's Estate.*] P. executed a voluntary settlement, by which he assigned certain personal property, including four debts which were due to him on the security of bills of sale, to trustees, with power to sue for the debts, upon trust to sell and convert into money the trust premises and execute and do such assurances and things as should be expedient, and to apply the proceeds for the benefit of his wife and other relatives. But he made no express assignment of the securities for the debts, nor did he give them up to the trustees. The settlor afterwards received payment of these four debts and died intestate. In an action for the administration of his estate and of the trusts of the settlement:—*Held* (affirming the decision of Kekewich, J.), that the debts were completely assigned by the voluntary settlement, and that the trustees were entitled to prove as creditors against the estate of the intestate in respect of the debts received by him.—Whether the trustees might have sued the intestate at law for the amount received by him, *quære.* *In re* PATRICK. BILLS *v.* TATHAM - - - **C. A. 82**

WAIVER—Lien for costs - - - **590**
See SOLICITOR. 3.
WATERWORKS COMPANY—Mortgage—Mortmain - - - - - **682**
See CHARITY. 2.
—— Transfer to local authority - - **315**
See LOCAL GOVERNMENT ACTS. 2.

WILL—*Construction—Condition—"Return to England."*] A testator appointed B., then residing in Australia, one of his executors and trustees, "if and when he shall return to England," and devised his real estates to his trustees upon the trusts of his will. B. returned to England eight years after the testator's death, for his health, and remained in this country six months, and then went back to Australia, without having proved the will or taken any part in the execution of the trusts:—*Held* (affirming the decision of North, J.), that B. had fulfilled the condition by his residence for a substantial period in England; and that, in the absence of evidence that he had dissented from or disclaimed the trusteeship before his return, the trusteeship and the estates vested in him on his coming to England. *In re* ARBIB AND CLASS'S CONTRACT - **C. A. 601**
—— Annuity—Right to receive value - **707**
See ANNUITY.
—— Charitable bequest—Cy-près - - **373**
See CHARITY. 1.
—— Charitable bequest—Mortmain - **682**
See CHARITY. 2.
—— Contingent legacy—Maintenance of infant
See INFANT. 1. [671
—— Investment clause—Company incorporated by Act of Parliament - - **501**
See TRUSTEE. 2.
WINDING-UP - - - - - **213**
See Cases under COMPANY. 3.
—— Shares held in Scotland—Conflict of laws
See CONFLICT OF LAWS. [536
WITNESS—Address of—Bill of sale - **464**
See BILL OF SALE. 1.
WORDS—"Address" - - - **464**
See BILL OF SALE. 1.
—— "Adjoining owner" - - - **51**
See METROPOLITAN BUILDING ACT.
—— "Company incorporated by Act of Parliament" - - - - **501**
See TRUSTEE. 2.
—— "Front main wall" - - - **194**
See LOCAL GOVERNMENT ACTS. 1.
—— "Gentleman" - - - - **657**
See PRACTICE. 1.
—— "Incorporated company" - - **627**
See BILL OF SALE. 2.
—— "Net profits" - - - - **140**
See COMPANY. 6.
—— "Previous litigation" - - - **601**
See VENDOR AND PURCHASER. 2.
—— "Return to England" - - - **601**
See WILL.
—— "Water company" - - - **315**
See LOCAL GOVERNMENT ACTS. 2.

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